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VOLUME 47 (2d Series)

Pages 447 to 543

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman
ROBERT E. LEE
CHARLOTTE T. REID
BENJAMIN L. HOOKS
JAMES H. QUELLO

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FCC 74R-234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BELO BROADCASTING CORP., WFAA-TV, DALLAS, TEX. For Renewal of Broadcast License	Docket No. 19744 File No. BRCT-33
WADECO, INC., DALLAS, TEX. For Construction Permit for New Television Broadcast Station	Docket No. 19745 File No. BPCT-4453

ORDER

(Adopted June 24, 1974; Released June 25, 1974)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. Before the Review Board for consideration are the following related pleadings filed on May 24, 1974, by Belo Broadcasting Corporation (WFAA-TV) (hereinafter Belo): (a) Motion for Leave to File Petition for Review of Memorandum Opinion and Order Granting February 22 Petition for Leave to Amend, and Waiver of § 1.301(b); (b) Petition for Review of Memorandum Opinion and Order Granting February 22 Petition for Leave to Amend; (c) Motion for Leave to File Petition for Review of Memorandum Opinion and Order Granting March 6 and March 27, Petitions for Leave to Amend, and Waiver of § 1.301(b); (d) Petition for Review of the Memorandum Opinion and Order Released April 19 Granting WADECO's March 6 and March 27 Petitions for Leave to Amend; (e) Motion for Leave to File Petition for Review of Order Denying Summary Decision and Waiver of § 1.301(b); (f) Petition for Review of Order Denying Motion for Summary Decision. Belo also requests, by separate motion, filed May 24, 1974, that the Review Board consolidate the above pleadings for consideration.[1] Since the above requests are interrelated, the Board will grant Belo's request for consolidation.

2. The Board will deny Belo's motions for leave to file petitions for review and will dismiss Belo's petitions for review. Section 1.301(b) of the Commissions' rules provides that "appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer." The Administrative Law Judge has denied Belo's request to appeal. Although a waiver of this section of the rules has been granted in the past, the Commission has explicitly stated that such a waiver will not be entertained ". . . except where it is shown

[1] Also before the Board are the following related pleadings: (a) opposition to WFAA-TV's Motions and Petitions, filed May 31, 1974, by the Broadcast Bureau; (b) opposition to Motions for leave to file petitions for review and waiver of Section 1.301(b), filed June 4, 1974, by WADECO, Inc.; (c) opposition to Petitions for Review, filed June 4, 1974, by WADECO, Inc.; (d) reply to oppositions, filed June 14, 1974, by Belo.

104-043—74

that there has been such a flagrant abuse of discretion as would inevitably require a hearing *de novo* . . . or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise be adequately protected." *Communications Satellite Corp.*, 32 FCC2d 533, 534, 23 RR 2d 286, 288 (1971). In the Board's view, Belo has clearly failed to show that the Judge's actions, *i.e.* acceptance of certain amendments and refusal to issue a Summary Decision, fall within this standard.

3. Accordingly, IT IS ORDERED, That the motion to consolidate for consideration and decision, filed on May 24, 1974, by Belo Broadcasting Corporation, IS GRANTED; and

4. IT IS FURTHER ORDERED, That the motions for leave to file petition for review of Memorandum Opinion and Order granting February 22 petition for leave to amend, and waiver of § 1.301(b), for leave to file petition for review of Memorandum Opinion and Order granting March 6 and March 27 petitions for leave to amend, and waiver of § 1.301(b), and for leave to file petition for review of Order denying summary decision and waiver of § 1.301(b), all filed May 24, 1974, by Belo Broadcasting Corporation, ARE DENIED; and

5. IT IS FURTHER ORDERED, That the petitions for review of Memorandum Opinion and Order granting February 22 petition for leave to amend, for review of the Memorandum Opinion and Order released April 19 granting WADECO's March 6 and March 27 petitions for leave to amend, and for review of Order denying motion for summary decision, all filed May 24, 1974, by Belo Broadcasting Corporation, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–623

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BIG CANOE TELEVISION SYSTEM, A DIVISION OF BIG CANOE CORP., BIG CANOE, A PRIVATELY OWNED RESORT DEVELOPMENT LOCATED IN PICKENS AND DAWSON COUNTIES, GA. For Certificate of Compliance	CAC–2135 GA085

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION:

1. Big Canoe Television System, a division of Big Canoe Corporation (Big Canoe), proposed operator of a new 12-channel cable television system at Big Canoe, Georgia, located outside all television markets, has filed an application for a certificate of compliance (CAC–2135). Big Canoe proposes to carry the following television broadcast signals:

WSB–TV (NBC, Channel 2), Atlanta, Georgia
WAGA–TV (CBS, Channel 5), Atlanta, Georgia
WQXI–TV (ABC, Channel 11), Atlanta, Georgia
WETV (Educ., Channel 30), Atlanta, Georgia
WTCG (Ind., Channel 17), Atlanta, Georgia
WHAE–TV (Ind., Channel 46), Atlanta, Georgia
WATL (currently dark, Channel 36), Atlanta, Georgia
WRCB–TV (NBC, Channel 3), Chattanooga, Tennessee
WTVC (ABC, Channel 9), Chattanooga, Tennessee
WDEF–TV (CBS, Channel 12), Chattanooga, Tennessee
WGTV (Educ., Channel 8), Athens, Georgia
WCLP–TV (Educ., Channel 18), Chatsworth, Georgia

Carriage of these signals is consistent with Section 76.57 of the Commission's Rules. The application is unopposed.[1]

2. Big Canoe asserts that since the system will be constructed completely on private land,[2] neither the state nor either of the counties in which it is situated has the authority to issue a franchise or any other permit. This contention is supported by an opinion of local counsel. In addition, Big Canoe has submitted letters from the Com-

[1] Rust Craft Broadcasting Company, licensee of Station WRCB–TV, Chattanooga, Tennessee, submitted comments on the application in which it requested single, on-channel carriage and network program exclusivity. Cable television systems are expected to comply with the Commission's Rules; the Rules do not require them to state affirmatively in an application for a certificate of compliance that they will comply. *Johnson All Channels, Inc.*, FCC 72–1008, 38 FCC 2d 61 (1972). We expect that the system will comply with all of our Rules.

[2] The roads in Big Canoe, a privately owned 5,000-acre resort development located within Pickens and Dawson Counties, are not dedicated to the public.

missioner of Pickens County and from the Commissioner of Dawson County which state that the counties have no franchising authority over cable television systems.[3] Therefore, Big Canoe requests waiver of Section 76.31 and has submitted an alternative proposal in lieu of a franchise. It asserts it will: (a) complete at least 20 percent of the trunk cable within the first year after certification and will equitably and reasonably extend energized trunk cable to 20 percent of the service area each year thereafter; (b) apply for a new certificate of compliance within 15 years; (c) publish rates and rate increases in a local periodical 30 days before they become effective and base the rates on industry-wide standards; (d) maintain a local and agent and telephone number to receive service complaints, resolve such complaints equitably, and have records of complaints available to the Commission for three years; and (e) amend its commitments and operations to conform to modifications of the Commission's franchise standards within a year of adoption or when Big Canoe applies for a new certificate of compliance, whichever comes first.

3. Big Canoe's alternative proposal is acceptable, and should assure compliance with the substance of Section 76.31 of the Rules. As in previous cases involving such alternative proposals,[4] our certification will extend until March 31, 1977, and is made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a grant of the request for waiver of Section 76.31 of the Rules and a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certification and Petition for Special Relief" (CAC–2135) filed by Big Canoe Television System, a division of the Big Canoe Corporation, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] The Georgia Attorney General's office has confirmed that the County Commissioners of each county determine their authority to issue a franchise.

[4] *See, e.g., Ultracom of Liberty County, Inc.*, FCC 73–1303, 44 FCC 2d 643 (1973); *Lake Telephone Co.*, FCC 73–1243, 44 FCC 2d 45 (1973).

FCC 74R-229

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATIONS FOR THE TRANSFER OF CONTROL OF D. H. OVERMYER COMMUNICATIONS COMPANY, INC., AND D. H. OVERMYER BROADCASTING CO., INC., FROM D. H. OVERMYER TO U.S. COMMUNICATIONS CORP.	Docket No. 18950 Files Nos. BTC-5376, 5377, 5378, 5379, and 5380

ORDER

(Adopted June 18, 1974; Released June 19, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board having under consideration the petition filed on June 14, 1974, by the Broadcast Bureau, for an extension of time to and including September 16, 1974, within which to file exceptions to the Supplemental Initial Decision (FCC 74D-29, released May 17, 1974);

2. IT APPEARING, That counsel for the other parties have indicated to petitioner their consent to a grant of the relief requested;

3. IT IS ORDERED, That the petition for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–563

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
HERBERT HAFIF
Concerning the Fairness Doctrine Involving Station KNBC, Los Angles, Calif.

MAY 30, 1974.

The format of the program was dictated by the candidates of Mr. Herbert Hafif against television station KNBC, Los Angeles, California, on May 29, 1974. You state that Mr. Mafif is a legally qualified candidate for the Democratic nomination for Governor of California in the June 4, 1974 primary; that three of his opponents are appearing on the KNBC program, News Conference, to be broadcast June 2, 1974; that KNBC has rejected your request for equal opportunities on the basis of its assertion that the program is a bona fide news interview exempt from the Equal Opportunities Provision of Section 315 of the Communications Act of 1934; that you base your belief that the program is not exempt upon the following:

The format is different from that usually employed since three interviewees are appearing instead of one.

The program is being lengthened from ½ hour to 1 hour.

The three opponents have previously appeared individually on the program.

The format of the program was dictated by the candidates since KNBC had originally intended to present all three, at the same time, but when one refused to so appear KNBC decided to present each candidate individually.

You also claim that KNBC has not fulfilled its fairness doctrine obligations in that the same three candidates, excluding their appearance on News Conference, have each received between 46–58 minutes of news coverage whereas Mr. Hafif has received only 16 minutes of news coverage.

In a telephoned response made May 30, 1974, NBC, licensee of KNBC states that the program will be broadcast on June 1, 1974 from 6:30–7:30 p.m. Pacific time; that the program is a bona fide news program that has been regularly scheduled since 1963; that the format remains the same in that only one candidate will appear at a time; that the candidates have no prior knowledge of questions to be asked; and that the entire program is within the control of of the licensee. NBC also states that on at least seven occasions during the past five years, more than one candidate has appeared on the program and the program has been lengthened to one hour.

With respect to the fairness doctrine, NBC maintains that the three candidates who are to appear on News Conference were chosen as representing significant contrasting views on the controversial issue

of public importance of who should be the Democratic nominee for Governor of California; that its decision not to include Mr. Hafif was based upon the journalistic judgment of its News department that his candidacy did not represent a significant contrasting viewpoint on the issue herein; that there is relatively small interest in his campaign as evidenced by the small amount of newspaper coverage received by him; and that the Mervin Field California Poll projects Mr. Hafif as receiving less than 2% of the vote.

On the basis of the information before the Commission it appears that the program is a bona fide news interview as it meets the criteria set forth in previous commission rulings and the legislative history of the section 315 exemptions. See Q's & A's 6–12, section III C, *Use of broadcast facilities by candidates for public office*, 35 Fed. Reg. 13048, 13053 (1970); *Martin Dworkis*, 40 FCC 361 (1962). As to more than one candidate appearing on the program on the see Q & A 12, *supra*.

The information before the Commission indicates that the format of the program is substantially the same as that employed since 1963. As to the lengthening of the program from ½ hour to 1 hour we do not believe that this affects the regularly scheduled news interview status of the program. See *Sam Yorty*, 35 FCC 2d 572 (1972).

With respect to NBC's compliance with the fairness doctrine, we have previously held that it is within the discretion of licensees to determine the relative significance of viewpoints on controversial issues of public importance. NBC has stated that in its judgment it did not believe that Mr. Hafif presented a significant contrasting view on the issue of who should be the Democratic nominee for Governor. You have not shown that NBC acted unreasonably in its judgment. See *Lawrence M. C. Smith*, 40 FCC 549 (1963); *Dr. Benjamin Spock*, 44 FCC 2d 12 (1973).

Accordingly, no further action is warranted on your complaint. Commissioner Robert E. Lee not participating.

By Direction of the Commission,
Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
LEWIS E. SINGER
Concerning the Fairness Doctrine Involving Station KPHX, Phoenix, Ariz.

JUNE 13, 1974.

This is in reference to your letter to the Commission dated May 24, 1974 concerning radio station KPHX, Phoenix, Arizona. You state that on May 17, 1974, on a talk show on KPHX, a Mr. Marvin Cooley and a Mr. Drexler appeared to discuss avoidance of income tax and to "plug" a lecture they were to deliver; that the statements made "were inflammatory and untrue"; that you felt that since you were "familiar with the correct facts" you should have the opportunity to "present a question to the guests which would expose the fallacy of their statements"; that you phoned in to the station, but you were not allowed to ask your question of the guests on the air because you had publicly announced your intention to run for the Arizona legislature and were told "it was station policy not to permit political candidates to speak"; that you explained that you were "not calling on a political issue but to bring out an untruth which would jeopardize any listener who would use the tactics suggested by Mr. Cooley"; that you also explained that you were "not an official candidate"; that even after these explanations you were not allowed on the air; that you then "phoned the District Director of the Internal Revenue in Phoenix, who was extremely disturbed but advised that he was powerless to take action"; that the following day a newspaper reported that a man had been convicted of income tax evasion after having followed the advice of Mr. Cooley and Mr. Drexler; and that "even if an opposing view would be presented at another date, the listening audience would be different and some innocent person would be tempted to try to evade the tax."

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it must afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political broadcast appeared on the air during his campaign. Instead, the broadcast license has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to

appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. Licensees are allowed considerable discretion in determining which issues are controversial issues of public importance, which controversial issues of public importance to cover, what shades of opinion on each are to be presented, the format, duration and scheduling of contrasting viewpoints, and the spokesmen to present each contrasting viewpoint. The Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith.

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information including: (1) the specific issue of a controversial nature of public importance broadcast (complainant should include an accurate summary of the views broadcast by the station or network); (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; (3) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming; (4) copies of correspondence between the complainant and the station or network; and (5) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

You have not provided any indication of what views were presented on the issue of "income tax evasion", nor have you provided any basis for the claim that the general topic of "income tax evasion" was a controversial issue of public importance, either locally or nationally, at the time of the broadcast.

Furthermore, you have not provided reasonable grounds to support the claim that KPHX broadcast only one side of the issue in its overall programming or that KPHX has failed to afford a reasonable opportunity in its overall programming for the presentation of contrasting viewpoints on the issue. As the United States Court of Appeals for the District of Columbia has stated:

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this issue. It is not enough for the complainant to allege that there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station. The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. *Healey* v. *FCC*, 460 F. 2d 917, 921 (D.C. Cir., 1972).

Finally, since you state that you have not yet fulfilled the requirements of the state of Arizona so as to be eligible to be voted for in the election for Arizona state legislature, you are correct in your statement that you are not a legally qualified candidate for public office within the meaning of Section 315 of the Communications Act. However, this does not mean that KPHX is required to allow you to personally re-

spond to an allegedly one sided presentation on a controversial issue of public importance. Except in the case of a personal attack, the fairness doctrine does not confer on any particular individual a right of reply to a presentation on a controversial issue of public importance. As stated above, the determination as to whether one side of a controversial issue of public importance has been presented and the choice of spokesmen for the presentation of contrasting viewpoints is within the reasonable good faith discretion of the licensee.

In view of the above, no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
DR. WILLIAM M. NEWBORN AND DR. RONALD GROTHAUS
Concerning the Fairness Doctrine Involving Station WSPD–TV, Toledo, Ohio

JUNE 12, 1974

This is in reference to your letter to the Commission dated May 23, 1974, wherein you make a complaint against station WSPD–TV, Toledo, Ohio. You state that the Board of Commissioners of the Metropolitan Park District of the Toledo Area are presently considering the acquisition of the Stranahan Estate for use as a park; that there is a strong movement among numerous individuals and citizen groups supporting this proposed acquisition; that "WSPD–TV's editorial staff has carried on a strenuous campaign opposing the acquisition of the Stranahan Estate by the public"; that this "strenuous campaign" consisted of two editorials; that the first editorial, broadcast on March 19, 1974, was rebutted on WSPD–TV by Dr. Mewborn as a representative of "Citizens for Metroparks"; that a Dr. Elliot J. Tramer requested an opportunity to rebut the second editorial, but this request was denied by WSPD–TV, which said that "a member of the Metropolitan Park Board . . . should answer the editorial"; that no opposing view to the second editorial has been presented by WSPD–TV; that it is your "contention that it is improper for Mr. Drury [Editorial Director of WSPD–TV] and/or the editorial staff to arbitrarily decide who should be allowed to answer WSPD–TV editorials and inappropriate that a government agency which is actively involved in an issue should be the only one allowed to reply to an editorial."

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it must afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a

single broadcast or series of broadcasts, no particular program need be specifically balanced by another particular program, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. Licensees are afforded considerable discretion in deciding what issues are controversial issues of public importance, what shades of opinion to present, format, timing and duration of presentation, and spokesmen for each point of view. The Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Before the Commission can take appropriate action with respect to a fairness doctrine complaint it must receive specific information providing a reasonable basis for the conclusion that a licensee has failed in its overall programming to afford reasonable opportunity for the presentation of contrasting viewpoints on a controversial issue of public importance. *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969).

While it is noted that you have corresponded with the station, neither your complaint nor the station correspondence enclosed therein is sufficient to provide a reasonable basis for the conclusion that the station has failed in its overall programming to provide a reasonable opportunity for the presentation of contrasting viewpoints on the issue involved.

Your complaint cites only two editorials in opposition to the acquisition of the Stranahan Estate, and you further indicate that Dr. Mewborn was afforded and accepted an opportunity to rebut one of them personally. Aside from these particular programs, you have submitted no information as to what other views on the issue, if any, were broadcast in the station's overall programming. Nor have you provided any information to dispute the licensee's response to Dr. Tramer's request which states that considerable opportunity has been afforded for the presentation of views favoring the acquisition. Under these circumstances, we cannot conclude that there are reasonable grounds to believe that the licensee has not complied with its fairness doctrine obligations in this matter or that a Commission inquiry with respect thereto would be appropriate.

With respect to the licensee's refusal of Dr. Tramer's specific request for response time, as noted above, no particular individual is entitled as a matter of right to appear on the station under the fairness doctrine. The Commission will consider such specific refusals of time only in the context of a showing that the licensee has not, overall, afforded reasonable opportunity for the presentation of contrasting views on the issue involved.

For the above reasons, no further Commission action is warranted on your complaint at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ISMAEL FLORY
Concerning the Fairness Doctrine Involving Station WTTW, Chicago, Ill.

JUNE 21, 1974.

This is in reference to your letters to the Commission of June 4 and 7, 1974. In your letter of June 4 you stated that on May 19, 1974 at 6:30 p.m. and on May 20, 1974 at 11:15 p.m., television station WTTW, Chicago, Illinois, broadcast a one hour debate between the Democratic and Republican Party Candidates for United States Senator from Illinois; that on May 24, 1974 you wrote to Mr. Richard Bowman, Program Coordinator of WTTW, requesting "equal time" on behalf of Mr. Ishmael Flory, Communist Party candidate for U.S. Senator from Illinois; that Mr. Bowman refused your request "on the grounds that the Illinois Election Law does not permit [Mr. Flory] to file his nominating petitions until the week following July 29, 1974"; that Mr. Flory announced his candidacy on March 22, 1974; that Mr. Flory's candidacy has received wide notice in the press and on radio and television; that Mr. Flory "has had his nominating petition signed by more than 13,000 of the 25,000 registered voters required to sign it in order for his candidacy to be certified for the ballot by the Illinois Election Board"; that Mr. Flory has had over 20,000 pieces of campaign literature distributed; that Mr. Flory "is legally qualified to hold the office he seeks"; and that you felt that WTTW's refusal of "equal time" for Mr. Flory was a violation of Section 315 of the Communications Act. Enclosed in your letter of June 4 was a letter to you from Mr. Bowman dated May 31, 1974, wherein Mr. Bowman stated that "individuals who are in the process of attempting to qualify for the Illinois ballot cannot be considered as legally qualified candidates until they have, in fact, filed with the Board of Election Commissioners"; and that after Mr. Flory "files with the Board of Election Commissioners we will definitely regard him as a legally qualified candidate and provide any necessary equal time obligations."

In your letter to the Commission dated June 7, 1974, you stated a similar complaint against radio station WRTH, Wood River, Illinois, in relation to a broadcast of a debate between the Democratic and Republican candidates for U.S. Senator on May 19, 1974. Enclosed in your letter of June 7 was a copy of a letter to you from Mr. Joseph Costantino, Vice President and General Manager of WRTH, wherein Costantino stated that "[i]n checking with the Secretary of State [of Illinois] in Springfield, we find that Mr. Flory is not a legally qualified candidate at this time, even though he has announced his candi-

dacy"; that the Democratic and Republican candidates, "who won their party primary elections, are the only legally qualified candidates"; that "Mr. Flory will be able to file as a candidate after July 29 by meeting the State's requirements for listing on the November ballot"; and that it was WRTH's opinion "that Mr. Flory is not yet a legally qualified candidate." [1]

As you are aware, Section 315 of the Communications Act provides that if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such legally qualified candidates for that office in the use of such broadcast station.

We are enclosing for your information copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, amendments enacted by the Congress, and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability and requisites of Section 315 in given situations.

Section 73.657(a) of the Commission's rules defines a legally qualified candidate as:

> * * * any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:
>
> (1) Has qualified for a place on the ballot or
>
> (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be

Further, Section 73.657(f) provides that a "candidate requesting such equal opportunities of the licensee, or complaining of non-compliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office."

Whether or not an individual is a legally qualified candidate for public office within the meaning of Section 315 and the Commission's rules must be determined by reference to the laws of the state in which the election is being held. (See the enclosed Public Notice of August 7, 1970, Q & A IV. 1.) The Commission has no authoritative information on the requirements of the state of Illinois for eligibility to be voted for in the November election, but it appears from the information which you furnished to the Commission that Mr. Flory is attempting to qualify for a place on the ballot by filing a petition with signatures of registered voters, that he does not yet have the required number of signatures on his petition, and that the date for filing such

[1] The Commission is also in receipt of your letters filed on June 13, 1974, wherein you made similar complaints against WREX–TV, Rockford, Illinois, and KTVI, St. Louis, Missouri.

petitions has not yet arrived. Therefore you have not shown that he is qualified for a place on the ballot under the laws of Illinois. See generally *In re Socialist Worker's Party*, 39 FCC 2d 89 (1972).

In view of your failure to show that Mr. Flory is a legally qualified candidate under the laws of Illinois, it does not appear that WTTW-TV, WRTH, WREX-TV, or KTVI have violated Section 315 of the Communications Act or the Commission's rules by refusing to afford him equal opportunities as a result of the appearances by the Democratic and Republican candidates for U.S. Senator. Therefore no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division for Chief, Broadcast Bureau.

FCC 74-631

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
CARL V. VENTERS, Jr.
For Consent To Transfer of Control of
Farmville Broadcasting Co., Licensee of
WFAG and Permittee of WRQR-FM,
Farmville, N.C.

JUNE 12, 1974.

This is with reference to the application for consent to transfer of control of The Farmville Broadcasting Company, licensee of WFAG and permittee of WRQR(FM), Farmville, North Carolina, from yourself to L. Gene Gray, Trustee (BTC-7093).

This application arises in the context of your seeking to become the president and a director of Durham Life Broadcasting Service, licensee of WPTF and WQDR-FM, Raleigh, North Carolina, and the general manager of these stations. In a letter dated April 27, 1972, your counsel, Wade H. Hargrove, sought a waiver of the Commission's Multiple Ownership Rules, to enable you to accept these positions at the Raleigh stations. A waiver was necessary because at that time you were the president, a director and 99% stockholder of The Farmville Broadcasting Company, licensee of WFAG, Farmville, N.C., and there was overlap of the 1 mv/m contours of WFAG and WPTF.

As a basis for the waiver, Mr. Hargrove contended that the overlap was *de minimis*, stating that the cities of license are 70 miles apart; that the overlap area contains a population of only 5,519 persons; that the population of the overlap area represents only .41% of the persons residing within the primary service area of WPTF and 11.3% of the persons rendered primary service by WFAG; that the overlap area is predominantly rural, containing no communities of any size; and that there is no solicitation for retail advertising accounts by either station in the city of the other or in the overlap area. In addition, Mr. Hargrove represented that you were prepared to relinquish your positions as president and a director of The Farmville Broadcast Company.

Because you were scheduled to commence your employment with WPTF on June 5, 1972, your counsel informally asked whether the Broadcast Bureau's staff could rule on the question of your employment solely as general manager of WPTF and leave for later determination by the Commission the question of whether you could also become an officer and director of the licensee of WPTF. By letter of May 26, 1972, the Deputy Chief of the Broadcast Bureau advised that your employment as general manager of the Raleigh stations would not be in contravention of the Commission's Multiple Ownership Rules.

You now seek to become the President and a director of Durham

104-043—74——2

Life Broadcasting Service and have filed the instant application in order to resolve any multiple ownership questions. In this regard, it should be noted that the circumstances have changed somewhat: you have sold outright approximately 22% of the stock of the company; and you have placed 37 shares (a 15.57% interest) in trust with L. Gene Gray, the General Manager of WFAG and transferee here.

In the instant application you propose to place an additional 150 shares (61.47%) of stock of The Farmville Broadcasting Company in trust with Mr. Gray. Under the Voting Trust Agreement, the trustee would have complete and independent authority to vote the stock. The trust will continue for nine years or until such time as you cease to be an officer and director of Durham Life Broadcasting Service. The trust may be terminated, however, upon written notice by you or the trustee, subject to prior Commission approval. As a result of this arrangement, Mr. Gray would exercise voting control of the corporation and your only interest therein would be a 77% beneficial interest.

The Commission has reviewed the entire record, including the staff ruling of May 26, 1972. The questions presented by the circumstances before us are as follows:

1. Do your concurrent interests in Stations WFAG and WPTF violate the Commission's "Cross Interest Policy"?

2. Will your employment as General Manager of WPTF and/or President and director of the licensee of WPTF constitute a "duopoly" interest under Section 73.35(a) of the Commission's Rules?

3. Is the overlap area of WFAG with WPTF *de minimis* so as to warrant a waiver of the rule in this instance?

4. Will the proposed voting trust obviate the multiple ownership problem if your positions at WPTF are considered a "duopoly" interest and the overlap is not *de minimis?*

The "Cross Interest Policy," is designed to ensure the preservation of arms-length competition by stations in the same service which serve substantially the same market. Under that policy *any* degree of cross interests in two or more stations in the same service which serve substantially the same market is prohibited. *Shenandoah Life Insurance Co.* 19 RR 1 (1959). Here, although there is overlap of the stations' 1 mv/m contours, neither encompasses the other's city of license. Thus they cannot be said to be serving the same market as we have defined that term in our First Report and Order in Docket 18110, 22 F.C.C. 2d 306, 308 (1970). This conclusion is reinforced by the fact that the Bureau of the Budget does not list Raleigh and Farmville in the same Standard Metropolitan Statistical Area and by your counsel's representations as to the stations' solicitation for advertising accounts. Thus, the Cross Interest Policy is not applicable here.

With regard to the duopoly question, Section 73.35(a) of the Commission's rules provides that a person may not "own, operate, or control" two standard broadcast stations whose 1 mv/m contours overlap. At the present time you have voting control of WFAG and you are General Manager of Station WPTF, the 1 mv/m contours of which overlap. The licensee of WPTF is Durham Life Broadcasting Services, Inc., which is a wholly owned subsidiary of Durham Life Insur-

ance Company, Inc. Upon review of all of the information before us it appears that your employment position is that of operating head of the broadcast subsidiary of a company whose primary business is insurance and that in such position you will be "operating" the Durham Life broadcast stations within the meaning of Section 73.35(a) of our Rules.

Although you do not show whether the assumption of the titles of President and Director of the licensee will materially enhance the degree of day-to-day control you have of the stations, we note that it is for all three positions that the WPTF licensee sought to hire you and that your predecessor as General Manager (R. H. Mason) also held the positions as President and Director of the licensee. Moreover, we also note that your counsel's letter of April 27, 1972, has recognized that, as officer, director and general manager at WPTF, you would, in fact, be operating that station within the meaning of the rule.

Accordingly, we conclude that your present concurrent interests in the stations violate the provisions of Section 73.35(a) of the Commission's Multiple Ownership Rules.

Your counsel has cited cases where the Commission held that the prohibited overlap was *de minimis* and the duopoly rule was waived. In *WIBF Broadcasting Co., Inc.*, 17 F.C.C. 2d 876 (1969), the overlap of the Grade B signals of two UHF television stations was found to be *de minimis*, despite the fact that the overlap area constituted 13.3% and 14.5%, respectively, of each station's Grade B coverage area. This holding must be viewed, however, in the light of the fact that the Commission was fostering the development of UHF television. Moreover, a proceeding was underway at that time, concerning proposed new propagation rules. Significantly, if the predicted Grade B contours of the two stations were calculated using the proposed new rules, there was no overlap. *The Tidewater Broadcasting Co., Inc.*, 2 F.C.C. 2d 364 (1966), involved stations located in cities which were physically and economically separated by a body of water, and whose 1 mv/m signals overlapped over the water. Such a precedent can have little bearing on a case where there are over 5,000 persons in the overlap area.

Your counsel has also attempted to show that, in terms of population, the overlap is *de minimis*. The Commission cannot agree that an overlap area population of 5,519 persons is, on its face, *de minimis*, especially in view of the fact that it constitutes a sizeable proportion (11.3%) of the persons within the primary service area of WFAG and must, by definition, constitute an even greater proportion of the population residing within the 1 mv/m contour of WFAG. Moreover, the Commission's own engineering study shows that the overlap area is 171 square miles, with a maximum penetration of 14 miles. The overlap area represents 40% of WFAG's 1 mv/m coverage area and more than 4% of that of WPTF. All factors considered, the overlap area cannot be said to be *de minimis*. Compare *KSOO TV, Inc., et al.*, 43 F.C.C. 2d 879 (1973) and KRNY, Kearny, Nebraska (Mimeo 64976), 1971.

Since your ownership of WFAG and operation of WPTF contravenes the Commission's "duopoly" rule and since the overlap of the

stations is not *de minimis*, the question remains whether placing your stock in WFAG in trust would cure the problem. During the term of the trust you would have no voice in the operation of WFAG. However, by its terms, the trust can be terminated prior to the termination of your employment with WPTF either by the expiration of the 9 year period or at any time by your written notice to the trustee. Thus, under the terms of the trust you could terminate this trust at will because of any dissatisfaction by you in Mr. Gray's operation of the station, rather than for just breach of fiduciary duty. In these circumstances we have concluded that the proposed trust device here will not so place the operation of WFAG out from your control as to cure the above noted violation of duopoly provisions of our Multiple Ownership Rules.

Accordingly, in view of the above, you are requested to inform the Commission, within 60 days of the date of this letter, of the steps you have taken to achieve compliance with our Multiple Ownership Rules. Since consummation of the proposed trust here would enable you to comply with the Rule but for the fact that it is not irrevocable during the term of your WPTF employment, and since we have determined that the transferee is fully qualified, we have concluded that the public interest, convenience and necessity would be served by a grant of your application subject to the following condition:

that the trust instrument be revised to provide that it is irrevocable by Mr. Venters during the term of his employment at WPTF and that the appropriate revisions be executed and filed with the Commission within 20 days from the date of the letter.

Commissioners Wiley, Chairman; and Hooks concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-624

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GRC CABLEVISION, INC., CHARLESTON, CLARKSVILLE, JEFFERSONVILLE, AND SELLERSBURG, IND. For Construction Permit in the Cable Television Relay Service	CPCLD-154 IN 083 IN 084 IN 085 IN 086

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT

1. On January 29, 1974, GRC Cablevision, Inc., operator of cable television systems at Charleston, Clarksville, Jeffersonville, and Sellersburg, Indiana, filed an application (CPCLD-154) for a construction permit, and approval under Section 310(a)(5) of the Communications Act of 1934, as amended, for a station in the Cable Television Relay Service (CARS). GRC proposes to operate a CARS station at Near Clarksville, Indiana, in order to improve the signal quality of Television Stations WTTV, Bloomington, Indiana, and WXIX-TV, Newport, Kentucky, for its subscribers in the above-captioned communities. GRC previously was granted a construction permit for the station,[1] but has surrendered it to the Commission. GRC presently is operating the station under a special temporary authorization.

2. This otherwise routine application poses a problem because GRC's parent corporation is controlled by aliens. TEL, Inc., a Massachusetts corporation, owns 150 out of the 250 shares in GRC; in turn, slightly more than fifty percent of the voting stock in TEL is owned by Messrs. J. Stephan McDonald, Robert B. McDonald, and Bruce J. McDonald—all of whom are Canadian citizens. The McDonald brothers' interests thus run from TEL to GRC and give them effective control of both corporations.

3. We therefore must consider whether "the public interest will be served" by denial of the requested license under Section 310(a)(5) of the Communications Act of 1934, as amended, since GRC is a "corporation directly . . . controlled by any other corporation . . . of which more than one-fourth of the capital stock is owned of record . . . by

[1] CPCAR-5394 (KTW-67), September 12, 1973. The initial construction permit was voluntarily surrendered in order to permit formal Commission consideration of the Section 310(a)(5) question.

aliens . . ." [2] We hold that the public interest would not be served by denial of a license to GRC.

4. A CARS license clearly is a "station license" within the meaning of Section 310(a).[3] Section 310(a)(5) requires us to deny a license only where the public interest demands, however, and we find that such action would not be appropriate here. Cf. *Joe Tom Easley*, FCC 58–1174, 25 FCC 1140.

5. We do not believe that the ownership interests of these three Canadian citizens in this CARS station are inimical to national policies. We note that the applicant's parent corporation, while owned in the majority by non-citizens, is a United States corporation, a majority of whose directors are citizens of the United States; that the non-citizens are from a country that has traditionally had close and friendly relations with the United States; and that we have no adverse information regarding these individuals. In addition, the facility in question will be used for the relay of broadcast signals and will thus be largely passive in operation. GRC Cablevision, Inc. otherwise appears to be a qualified and eligible applicant. The application otherwise being in order, we thus find that denial of this license would not be in the public interest.

6. We are not establishing a rule of general applicability, however, for all alien ownership of CARS stations. Accordingly, we will continue to examine instances of alien ownership on a case-by-case basis. Moreover, our action here represents no departure from our traditional policies in regulation of broadcast television. Alien ownership in that medium presents different questions which we will deal with as they rise in concrete situations.

In view of the foregoing, the Commission finds that a grant of the subject application for a construction permit in the CARS service would serve the public interest, convenience and necessity:

Accordingly, IT IS ORDERED, That the application (CPCLD–154) for construction permit filed by GRC Cablevision, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] Section 310(a)(5) provides:

Section 310. (a) The station license required hereby shall not be granted to or held by—

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted after June 1, 1935, by aliens, their representative, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

[3] Section 3 (cc) provides:

"Station license," "radio station license," or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the instrument may be designated by the Commission.

FCC 74-613

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
INTERNATIONAL TELEMETER OF NEW BEDFORD, NEW BEDFORD, MASS.	CAC-656 MA055
WHALING CITY CABLE TV, INC., NEW BEDFORD, MASS.	CAC-1813, CSR-334 MA067
INTERNATIONAL TELEMETER OF BRISTOL COUNTY, ACUSHNET, MASS.	CAC-2836 MA075
INTERNATIONAL TELEMETER OF BRISTOL COUNTY, DARTMOUTH, MASS.	CAC-2837 MA076
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 20, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND REID CONCURRING IN THE RESULT.

1. The Commission has before it four contested applications for certificates of compliance for new cable television systems within the Providence, Rhode Island-New Bedford, Massachusetts, television market (#33). Three of these applications were filed by two subsidiaries of Athena Communications Corporation, International Telemeter of New Bedford and International Telemeter of Bristol County,[1] and one by Whaling City Cable TV, Inc. On June 15, 1972, International Telemeter requested certification to commence cable television service at New Bedford in Bristol County, Massachusetts. Whaling City filed an application on January 11, 1973, likewise to begin New Bedford operations. On July 20, 1973, International Telemeter of Bristol County filed applications for certificates of compliance to initiate service at Acushnet and Dartmouth, Massachusetts, communities which are contiguous to New Bedford. International Telemeter and Whaling City propose to offer subscribers the following television broadcast signals:

WTEV (ABC, Channel 6), New Bedford, Massachusetts
WJAR-TV (NBC, Channel 10), Providence, Rhode Island
WPRI-TV (CBS, Channel 12), Providence, Rhode Island
WSBE-TV (Educ., Channel 36), Providence, Rhode Island
WBZ-TV (NBC, Channel 4), Boston, Massachusetts
WCVB-TV (ABC, Channel 5), Boston, Massachusetts
WNAC-TV (CBS, Channel 7), Boston, Massachusetts

[1] Unless otherwise indicated, reference to International Telemeter hereinafter includes both International Telemeter of New Bedford and International Telemeter of Bristol County.

WSBK–TV (Ind., Channel 38), Boston, Massachusetts
WGBH–TV (Educ., Channel 2), Boston, Massachusetts
WKBG–TV (Ind., Channel 56), Cambridge, Massachusetts

International Telemeter additionally proposes to carry the following television signals:

WGBX–TV (Educ., Channel 44), Boston, Massachusetts
WSMW–TV (Ind., Channel 27), Worcester, Massachusetts
WHCT–TV (Ind., Channel 18), Hartford, Connecticut

Carriage of these signals is consistent with the Commission's signal carriage rules.

2. International Telemeter of New Bedford's application is opposed by New Boston Television, Inc., licensee of Station WSBK–TV, and Whaling City. Oppositions and petitions for special relief were filed against the applications of International Telemeter and Whaling City by Providence Television, Inc., licensee of Station WPRI–TV, and WGAL Television Inc., licensee of Station WTEV. Both International Telemeter and Whaling City have replied. In addition, Westinghouse Broadcasting Company, Inc., licensee of Station WBZ–TV submitted an opposition to the petition for special relief filed by Providence Television and Boston Broadcasters, Inc., licensee of WCVB–TV, filed an opposition to WGAL Television.[2]

3. In its opposition and petition for special relief, Providence Television requests that the Commission limit International Telemeter's and Whaling City's signal complement to one of the following: (a) carriage of Providence-New Bedford stations together with independent UHF stations from the Boston-Cambridge-Worcester market; (b) carriage of Providence-New Bedford and Boston-Cambridge-Worcester stations, subjecting the latter signals to exclusivity restrictions protecting the non-network as well as network programming of the Providence-New Bedford stations; or (c) if Boston-Cambridge-Worcester signals are authorized without the requested exclusivity restrictions, carriage of Providence-New Bedford and Boston-Cambridge-Worcester signals only. Additionally, Providence Television requests that if its third proposal is adopted, the Commission should institute a rulemaking proceeding to consider combining Providence-New Bedford and Boston-Cambridge-Worcester into a single market to the extent of requiring stations from one market to be carried wherever stations from the other market are required to be carried. Providence Television bases its requests on the alleged adverse effect of importing five commercial television signals, three network and two independent from the Boston-Cambridge-Worcester market.[3] Conceding that these signals are significantly viewed in Bristol County, Providence Television asserts that their carriage would be inconsistent with the Commission's underlying policy of restraint in permitting cable carriage of television broadcast signals while the absence of these signals would have little adverse impact on cable growth.

[2] International Telemeter also amended its application to delete its original request to carry independent television stations WNEW–TV and WOR–TV, New York, New York, and to propose carriage of the WHCT–TV and WGBX–TV signals. Several objections raised in the pleadings have been rendered moot by this amendment, and, therefore, will not be discussed.

[3] Providence Television does not oppose carriage of a sixth Boston-Cambridge-Worcester market station, WSMW–TV, Worcester, Massachusetts.

4. We must reject Providence's arguments. Providence Television's general assertions regarding our significant viewing rules are really efforts to revive the "footnote 69" approach to signal carriage in overlapping major markets.[4] The reasons for changing our approach in these situations are adequately set forth in the *Cable Television Report and Order*, 36 FCC 2d 143, 174, in which we expressed that our present policy is based on a conviction that:

> Cable development is not likely to be advanced if television choices on the cable are more limited than choices over the air, nor is it reasonable that signals significantly viewed over the air be excluded from carriage on cable systems.

All of the television signals in question are significantly viewed and no showing has been presented which justifies a waiver of the Commission's "go, no-go" signal carriage policy with respect to significantly viewed signals. Providence is, of course, free to file a rule making request to combine the two markets.

5. WGAL Television, in addition to supporting the objection raised by Providence Television, specifically objects to carriage of WCVB–TV as a significantly viewed signal.[5] WGAL Television's arguments in the instant proceeding were reviewed in connection with *Boston Broadcasters, Inc.*, FCC 73–904, 42 FCC 2d 669 (1973), wherein we ruled that significant viewing status once attributed to a particular station will be attributed to any subsequently authorized station utilizing the same channel in the same city, and operating with substantially the same technical facilities as the prior station. We subsequently added WCVB–TV to the list of significantly viewed signals in Appendix B to the Rules. Accordingly, WGAL Television's argument is rejected. International Telemeter and Whaling City are, of course, required to conform their operations to Sections 76.91 and 76.93 of the Rules by providing network program exclusivity protection against WCVB–TV as well as the other adjacent market network signals proposed for carriage.

6. In its opposition to International Telemeter of New Bedford's application, Whaling City, insofar as it does not duplicate other objections, argues that the franchise selection process and the franchise awarded in New Bedford contravene both Massachusetts law and the Commission's Section 76.31 franchise standards. The petitioner alleges inconsistencies with the Massachusetts statute (Mass. G.L. 166A) because: (1) notice of the franchise selection proceeding published in the "New Bedford Times" did not sufficiently specify who the applicants were or identify the subject matter; (2) the franchise hearings did not include cross-examination of competing applicants; (3) the Mayor of New Bedford awarded the franchise to International Telemeter in violation of a preliminary injunction issued by the Superior Court of Bristol County and failed to issue a written public statement to justify selection of the prevailing applicant; and (4) International

[4] *Second Report and Order in Docket 15971*, 2 FCC 2d 725, 786 (1966). In the *Notice of Proposed Rulemaking in Docket No. 18397*, 15 FCC 2d 417, 436 (1968), carriage of overlapping signals would have been permitted only if the community was wholly within the 35-mile zones of both major markets.

[5] WCVB–TV replaced WHDH–TV (CBS) on Channel 5 in Boston. WHDH–TV had been listed in Appendix B to the Commission's Rules as a significantly viewed signal in Bristol County.

Telemeter has not obtained a "confirmatory license" from the Massachusetts Community Antenna Television Commission in addition to its franchise. Whaling City contends that the Commission's franchise standards were not followed because (1) the Mayor did not adequately provide for public participation in the franchise proceeding pursuant franchise requires that construction of the system must be completed within six years from the date of license, a time frame falling short of the requirements of Section 76.31(a)(2); and, (3) the franchise does not satisfy the subscriber rate or complaint resolution provisions to Section 76.31(a)(1) of the Rules; (2) International Telemeter's of Section 76.31(a) (4) and (5) of the Rules. In its reply, International Telemeter notes that the court injunction pending against the Mayor was not only dissolved and the suit dismissed but that the franchise was issued one hour before the injunction became effective. Additionally, International Telemeter argues that even if the injunction was issued prior to the franchise grant, a franchise once adopted by proper authority is valid. International Telemeter also maintains that it complied with each of the provisions of the Massachusetts statute referred to by Whaling City. Regarding the alleged inconsistencies with the Commission's Rules, International Telemeter points out that its franchise was issued three months before the effective date of the new Rules and therefore need only substantially comply with Section 76.31.

7. Whaling City's arguments must be denied. Whaling has raised a number of points which require an interpretation of Massachusetts law. The applicant has fulfilled our requirements by submitting a franchise that is valid on its face, issued by an appropriate local authority, and no opposition has been filed by the state regulatory agency. If Whaling City has evidence that Massachusetts law has been violated in the issuance of the franchise, the appropriate forum is a Massachusetts court of competent jurisdiction or the Massachusetts Community Antenna Television Commission. Compare, *Aberdeen Cable TV Service, Inc.*, 20 FCC 2d 475, 476 (1969). Second, in determining whether violations of this Commission's franchise standards exist, we note that the state cable television commission shares jurisdiction in Massachusetts with local franchising authorities. Therefore, franchise requirements of state law must be considered in addition to the local ordinance. Examined in this perspective, International Telemeter's franchise, issued on December 20, 1971, substantially complies with Section 76.31(a) of the Rules. *CATV of Rockford, Inc.*, 38 FCC 2d 10 (1972), *recons. denied*, 40 FCC 2d 493 (1973).[6] Massachusetts General Laws, Chapter 166A, Section 6, requires that a full public hearing be held prior to the issuance of a license. Since filing submitted by the applicant, including the affidavit of its attorney, indicate that such a proceeding took place and the Massachusetts Commission has not contested the award of the franchise, we conclude that the franchise selection process complies with Section 76.31(a)(1) of the Rules. Moreover, both the New Bedford franchise and the Massachusetts statute require construction of not less than ten (10) percent of the city each year and completion of the system within six years. This standard meets Commission requirements. Finally, the franchise and Massachusetts statute

[6] Inconsistencies with the franchise fee limitations in Section 76.31 of the Rules, not raised by Whaling City, are discussed in paragraphs 12–16.

give sufficient attention to rate regulation and disposition of subscriber complaints. The franchise specifies initial subscriber rates and requires the operator to maintain a local business office and telephone; the statute both provides for a $7.00 ceiling on subscriber rates until the state agency with public participation determines a statewide policy on rate regulation and establishes a complaint resolutions procedure involving both local authorities and the Commission.

8. No objections have been filed regarding the ordinances enacted for Whaling City and International Telemeter of Bristol County. Nevertheless, we note that, with the exception of inconsistencies in the franchise fee of International Telemeter of Bristol County's franchises as discussed in paragraph 14 below, all three franchises meet the requirements of Section 76.31 of the Rules. Although, these franchises were issued after the effective date of the new rules, when read in conjunction with the Massachusetts statute, as explained in the preceding paragraph, they contain the recitations necessary for strict compliance.

9. New Boston Television, Inc., alleges that International Telemeter of New Bedford's subscriber rates are "unusually high" and questions the applicant's intention to comply with Section 76.55(a)(2) of the Rules which requires a cable system to carry broadcast signals on the same channel on which the station is transmitting. Additionally, New Boston contends that International Telemeter's access statements are inconsistent with Section 76.251 of the Commission's Rules because: (a) the application proposes 13 Class I channels for retransmission of television broadcast signals but mentions only nineteen channels when a minimum capacity of 26 is required by virtue of 76.251(a) of the Rules; (b) the application does not detail the access proposal with sufficient specificity; (c) pursuant to the franchise agreement, two channels each are reserved at no cost for governmental and educational authorization—twice the number specified by Section 76.251 of the Rules—but no "special showing" has been made as required by Paragraph 132, *Cable Television Report and Order*, 36 FCC 2d at 193.

10. Except for its objection to International Telemeter's designated access channel proposal, we find New Boston's opposition to be without merit. No evidence has been submitted to support the allegation of unusually high subscriber rates. Moreover, as Paragraph 183 of the *Report and Order*, 36 FCC 2d at 209 and Section 76.31(a)(4) of the Rules suggest, rate setting is not a matter with which the Commission should concern itself. With regard to the on-channel carriage objection the applicant promises to carry all local and/or market VHF signals on-channel where technically feasible. Since UHF signals must be converted to accommodate the cable spectrum, carriage of these signals without materially degrading their quality meets the requirements of Section 76.55 of the Rules. *See TelePrompTer Cable Communications Corporation*, FCC 73–971, 42 FCC 2d 1122 (1973). In reply to New Boston's allegation concerning bandwidth, International Telemeter states that it will install a 32 channel system in New Bedford. Since our rules require only that systems be capable of providing an equivalent amount of broadcast and nonbroadcast bandwidth, the applicant's proposal is more than adequate. Finally, International Telemeter's application and reply to New Boston's objections present

a sufficiently detailed access proposal to create a *prima facie* presumption that the applicant will subscribe to the Commission's minimum requirements. New Boston has presented no evidence to rebut this presumption. See *Viking Media Corporation*, FCC 72-875, 37 FCC 2d 605 (1972). *Johnson All Channels, Inc.*, FCC 72-1008, 38 FCC 2d 61 (1972). We note that International Telemeter of Bristol County's applications for Dartmouth and Acushnet whose access proposals incorporate the terms of the New Bedford application, are thereby equally consistent with the rules.

11. The designated access channel specifications written into the franchise for International Telemeter of New Bedford present a more significant problem. The two free channels apiece reserve for municipal and educational access purposes exceeds the single channel provision specified by Section 76.251(a) of the Rules. Although the Commission has not ruled out arrangements between the cable operator and franchising authority to experiment with additional designated channels, we have stressed that local entities will not be allowed to reserve additional channel space at no cost absent a special showing by the cable system and franchising authority. *Cable Television Report and Order*, 36 FCC 2d at 193. Neither International Telemeter nor the City of New Bedford has presented to the Commission any justification for the additional channels required by the ordinance. The applicant's assurance that it agreed to the extra access requirements on a "voluntary basis" does not provide a satisfactory explanation. Similar access provisions exist in the franchises awarded to International Telemeter of Bristol County by the cities of Acushnet and Dartmouth.[7] Since no showing was made to justify the access proposals for any of these systems, they are inconsistent with the Rules.

12. We note that additional access channel space is not the only excessive demand for services stipulated in International Telemeter's franchises for New Bedford, Acushnet, and Dartmouth. The franchises also require the grantee to furnish at no cost to the respective cities and their cable subscribers use of all equipment and facilities necessary to operate the access channels specified in the ordinances. Local educational authorities must be given priority use of these facilities which are to include a fixed studio and mobile unit capable of broadcast origination and sufficient personnel must be made available to operate these studios. Furthermore, no commercial use may be made of the specified access channels and they may not be set over or assigned to persons or entities not engaged in educational or public activities. In addition, the grantee is required to provide a free cable drop and outlet in every classroom, school auditorium, cafeteria, and administrator's office of every public and private school; in the Mayor's office and city council chambers; and to all public buildings designated by the issuing authorities.

13. These requirements are inconsistent with both our access rules and limitations on franchise fees. In addition to excessive demands for access channel space, the franchises further violate Section 76.251 by proscribing any commercial use of these channels. Section 76.251

[7] The Dartmouth franchise initially requires the grantee to furnish only one municipal and one educational channel at no cost but asks for an additional free educational channel when the existing one is eighty (80) percent utilized.

(a) (7) of the Rules expressly permits operators to offer "unused portions of the specially designated channels" for leased channel operations. Furthermore, pursuant to Section 76.251 (a) (11) (iv):

> Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels.

Since no justification for this exception to our access rules has been submitted, we believe that specific authorization would be inappropriate at this time.

14. Section 76.31 (b) of the Rules imposes a franchise fee limitation of three percent (3%) of gross subscriber revenues but permits higher fees if justified by a "planned local regulatory program." Since the Rule encompasses "all forms of consideration," provisions in an ordinance requiring that the grantee furnish free services and facilities to the community compromise a type of fee. The costs imposed on International Telemeter by the extra access facilities and services palpably exceed the limitation prescribed by the Rule, and presumptively, at least, fail to meet the stipulation that fees in excess of three percent (3%) must be intended for regulatory purposes. Although in the *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, FCC 74–384, 46 FCC 2d 175 (1974), we made an exception to this rule where the extra service package was not clearly excessive and could potentially benefit all cable users, here the pertinent franchise requirements are intended for the benefit of designated specialized users, in particular educational and municipal authorities. Hence, the required extra services must still be considered as a type of cross-subsidy to be viewed in the context of the franchise fee.

15. Free wiring of schools and other public buildings is another payment-in-kind and also must be viewed as part of the franchise fee subject to the limitation in Section 76.31 (b). However, providing cable drops is a one time capital outlay that will not grossly overburden the operator especially in light of the minimal annual franchise fee of $1.00 per subscriber imposed by Massachusetts regulatory authorities. Since only substantial compliance is required of the New Bedford franchise, we believe that the total costs imposed on International Telemeter are sufficiently consistent with Section 76.31 (b) to bring the required free drops within the perimeters of the doctrine. On the other hand, the franchises for Acushnet and Dartmouth were issued subsequent to the effective date of the Rules and must strictly comply with our franchise standards. Accordingly, we will not waive Section 76.31 to accommodate the requirements in the Acushnet and Dartmouth franchises that the grantee wire entire public buildings at no cost to the franchisor.[8]

16. Faced with these inconsistencies with our Rules, we must decide how to dispose of the applications filed by International Telemeter of

[8] As we noted in Paragraph 109 of the *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, supra*, we have no objection to franchise provisions which require one free cable for each school or municipal building in the community. However, the requirement in the Acushnet franchise that the grantee provide free installation and service to a contemplated sixty unit elderly housing project is clearly not consistent with our Rules.

New Bedford and Bristol County. We note that the ordinances for these communities state, in pertinent part, that they are "subject to all . . . requirements of the Federal Communication Commission. . . ." Accordingly, we construe this language to mean that the franchising authorities intend to condition the effectiveness of the provisions of their respective franchises upon their compatibility with the Commission's Rules. Therefore, we shall issue appropriate certificates of compliance upon notification from the appropriate franchising authorities that the inconsistent provisions will not be enforced.

Accordingly, IT IS ORDERED, That the "Opposition to Application" (directed against CAC–656) filed by New Boston Television, Inc., licensee of Station WSBK–TV, Boston, Massachusetts, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance" (directed against CAC–656), filed by Whaling City Cable TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application and Petition for Special Relief" (directed against CAC–656 CAC–2836, CAC–2837) and the "Petition for Special Relief" (CSR–334 directed against CAC–1218) filed by Providence Television, Inc., licensee of Station WPRI–TV, Providence, Rhode Island, ARE DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance for New Bedford, Massachusetts" (directed against CAC–656, CAC–2836, CAC–2837) and "Comments of WGAL Television, Inc., in Support of Petition for Special Relief" (CSR–334) filed by WGAL Television, Inc., licensee of Station WTEV, New Bedford, Massachusetts, ARE DENIED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance for New Bedford, Massachusetts" (CAC–656), as amended, filed by International Telemeter of New Bedford, IS GRANTED, and an appropriate certificate of compliance will be issued after the condition noted in paragraph 16 above is satisfied.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–2836), filed by International Telemeter of Bristol County, IS GRANTED, and an appropriate certificate of compliance will be issued after the condition noted in paragraph 16 above is satisfied.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–2837), filed by International Telemeter of Bristol County, IS GRANTED, and an appropriate certificate of compliance will be issued after the condition noted in paragraph 16 above is satisfied.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–1813), filed by Whaling City Cable TV, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
JERRY LAWRENCE, SANTA PAULA, CALIF.	Docket No. 19865 File No. BPH-8051
WILLIAM F. WALLACE AND ANNE K. WALLACE, JOINT TENANTS, SANTA PAULA, CALIF.	Docket No. 19866 File No. BPH-8105
CLARK ORTONE, INC., FILLMORE, CALIF.	Docket No. 19867 File No. BPH-8111
CLASS A BROADCASTERS, INC., FILLMORE, CALIF.	Docket No. 19868 File No. BPH-8234

ORDER

(Adopted June 18, 1974; Released June 19, 1974)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the motion filed on June 12, 1974, by William F. Wallace and Anne K. Wallace, Joint Tenants, for an extension of time to and including June 17, 1974 within which to file replies to the oppositions to the petition to enlarge issues, filed by Class A Broadcasters, Inc. on December 14, 1973, and, to file a reply to the opposition to the petition to enlarge issues, filed by William F. Wallace and Anne K. Wallace, Joint Tenants, on March 1, 1974;

2. IT APPEARING, That counsel for the other parties have indicated to petitioner their consent to a grant of the relief requested;

3. IT IS ORDERED, That the motion for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-233

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
KEY BROADCASTING CORP., LEXINGTON PARK, MD.	Docket No. 19410 File No. BPH-6540
SOUND MEDIA, INC., LEONARDTOWN, MD.	Docket No. 19411
For Construction Permits	File No. BPH-6886

ORDER

(Adopted June 24, 1974; Released June 25, 1974)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. On April 11, 1974, Key Broadcasting Corporation (Key) filed a contingent petition to enlarge issues with the Review Board. A supplement to that petition was filed on April 18, 1974. By Memorandum Opinion and Order released May 21, 1974, FCC 74R-184, the Board denied Key's contingent petition to enlarge issues. However, on May 22, 1974, Key filed a further supplement to contingent petition to enlarge issues.[1] Now before the Board is a petition to dismiss the further supplement, filed on May 24, 1974, by Sound Media, Inc. (Sound). In light of our prior action on Key's contingent petition to enlarge issues, the Board will grant Sound's petition and dismiss Key's further supplement to the contingent petition to enlarge issues.

2. Accordingly, IT IS ORDERED, That the petition To dismiss "further supplement to contingent petition to enlarge issues", filed on May 24, 1974, by Sound Media, Inc., IS GRANTED, and the Further Supplement to Contingent Petition to Enlarge Issues, filed on May 22, 1974, by Key Broadcasting Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] An opposition to the supplement was filed June 5, 1974, by the Broadcast Bureau.

FCC 74-336

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LVO CABLE OF CONNECTICUT, INC.	
BRISTOL, CONN.	CAC-369/CSR-242 (CT012)
FARMINGTON, CONN.	CAC-370/CSR-243 (CT013)
PLAINVILLE, CONN.	CAC-371/CSR-244 (CT014)
NEW BRITAIN, CONN.	CAC-372/CSR-245 (CT015)
BERLIN, CONN.	CAC-373/CSR-246 (CT016)

MEMORANDUM OPINION AND ORDER

(Adopted April 3, 1974; Released April 11, 1974)

BY THE COMMISSION:

1. LVO Cable of Connecticut, Inc.[1] has filed applications for certificates of compliance to commence cable television operations at the above-captioned communities,[2] all located within the Hartford-New Haven-New Britain-Waterbury, Connecticut (#19) and Springfield, Massachusetts (smaller) television markets. The applications propose carriage of the following television broadcast signals:[3]

WEDH (Educ., Channel 24), Hartford, Connecticut
WHCT-TV (Ind., Channel 18), Hartford, Connecticut
WTIC-TV[4] (CBS, Channel 3), Hartford, Connecticut
WHNB-TV (NBC, Channel 30), New Britain, Connecticut
WTNH-TV (ABC, Channel 8), New Haven, Connecticut
WTVU (CP, Channel 59), New Haven, Connecticut
WATR-TV (NBC, Channel 20), Waterbury, Connecticut
WWLP (NBC, Channel 22), Springfield, Massachusetts
WHYN-TV (ABC, Channel 40), Springfield, Massachusetts
WGBY-TV (Educ., Channel 57), Springfield, Massachusetts
WSBK-TV (Ind., Channel 38), Boston, Massachusetts
WOR-TV (Ind., Channel 9), New York, New York

[1] The subject applications were originally filed in the name of Grossco CATV, Inc. However, on August 16, 1973, the Commission was notified that the Connecticut Public Utilities Commission had approved the acquisition of fifty percent interest in Grossco by LVO and that applicant's name had been changed to LVO Cable of Connecticut, Inc.

[2] Population figures for the cable communities are approximately as follows: Bristol, 55,487; Farmington, 3,483; Plainville, 16,733; New Britain, 83,441; Berlin, 1,200. LVO's systems will all have 36-channel capacity. Each system will provide all required access cablecasting services.

[3] LVO has also requested carriage of WUHF-TV (CP, Channel 61), Hartford, Connecticut, and WFTT (CP, Channel 43), Bridgeport, Connecticut. WHUF's construction permit expired on October 1, 1970, and subsequently, on April 30, 1971, the construction permit was cancelled and the call letters deleted. WFTT's license to cover a construction permit was dismissed with prejudice by Order adopted July 20, 1971, by the Review Board. The call letters were deleted and the license dismissed on that date. Thus LVO's request for these signals is moot.

[4] Now WFSB-TV.

Carriage of these signals is consistent with Section 76.61 of the Rules. Connecticut Television, Inc., licensee of Station WHNB–TV, New Britain, Connecticut, has filed petitions for special relief and objections to the subject applications, and LVO has replied.[5]

2. Connecticut Television alleges in its objections that there is a substantial question as to the status of LVO's franchise as a result of two possible unauthorized transfers in violation of Connecticut law. Therefore, it is urged that certificates should not issue unless and until this matter is resolved by the Connecticut Public Utilities Commission (PUC). In its reply, LVO submits an affidavit of local counsel stating that there has been no unauthorized transfer of control of the franchise, and the transfers alleged by Connecticut Television to be "possibly unauthorized" were conducted with full disclosure to and knowledge of the Connecticut PUC. We have received no evidence which would contradict this affidavit and, therefore, are persuaded that no unauthorized transfer has occurred. Connecticut Television further argues that notices of proposed cable television operations filed by the applicant pursuant to former Section 74.1105 of the Rules were premature because of alleged invalidity of the then-existing franchises, and therefore the systems are not entitled to grandfathered status. We have previously considered the effect of the Connecticut franchising procedures on notifications filed pursuant to former Section 74.1105 and have determined that consistent carriage proposals in such notices are, in fact, grandfathered pursuant to Section 76.65 of the Rules. *Valley Cable Vision, Inc.*, 44 FCC 2d 232 (1973). In any case, none of the signals proposed for carriage by LVO is inconsistent with our current rules. Therefore, we will deny Connecticut Television's objections.

3. Connecticut Television seeks special relief in the form of specialized carriage and program exclusivity requirements. However, these requests have been considered on the merits previously and were denied in *Telesystems Corporation*, FCC 74–160, —— FCC 2d —— (released February 22, 1974). For the reasons discussed in that Memorandum Opinion and Order, we will deny the subject petitions for special relief.[6]

In view of the foregoing, we find that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objections of Connecticut Television, Inc." filed by the licensee of Station WHNB–TV, ARE DENIED.

IT IS FURTHER ORDERED, That the "Objections to Applications for Certificates of Compliance" filed by WGBH Educational Foundation ARE DISMISSED as moot.

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[5] WGBH Educational Foundation, licensee of Station WGBY–TV, filed an objection that LVO did not propose to carry WGBY–TV as requested. LVO filed an amendment adding WGBY–TV to its carriage proposal, thereby mooting WGBH's objection. Objections directed to the franchises awarded to the subject cable systems were filed by Broadcast Plaza, Inc., licensee of Station WTIC–TV, and Connecticut Television, Inc. These objections have been considered previously and were denied in *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *recons. denied*, 40 FCC 2d 191 (1973).

[6] On February 12, 1974, Connecticut Television filed a "Request for Withdrawal" of its petitions for special relief. However, because we have ruled on the merits of its arguments in *Telesystems Corporation, supra*, we deem it appropriate to deny those arguments herein.

IT IS FURTHER ORDERED, That the "Petition[s] for Special Relief" (CSR–242, 243, 244, 245, 246) filed by Connecticut Television, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–369, 370, 371, 372, 373) filed by LVO Cable of Connecticut, Inc. ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

FCC 74-650

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MIDLAND TELEVISION CORP., STATION KMTC-TV, SPRINGFIELD, MO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 26, 1974)

BY THE COMMISSION:

1. The Commission has under consideration its Notice of Apparent Liability for forfeiture dated August 16, 1973, addressed to Midland Television Corporation, licensee of Station KMTC-TV, Springfield, Missouri.

2. The Notice of Apparent Liability for forfeiture in this proceeding indicated that the licensee of Station KMTC-TV, Springfield, Missouri, was subject to forfeiture in the amount of three thousand dollars ($3,000) for its apparently willful or repeated violations of Sections 73.670(a)(1)(ii), 73.670(a)(1)(iv), and 73.670(a)(2)(ii) of the Commission's Rules in that licensee failed to enter the beginning and ending times of a program in the program log on three occasions (73.670(a)(1)(ii)); failed to identify a program's source in the program log on two occasions (73.670(a)(1)(iv)); and did not log the correct amount of commercial matter within a program on three occasions (73.670(a)(2)(ii)).

3. From January 31, 1970 through August 19, 1972, KMTC-TV broadcast a program entitled "National Chinchilla" which was presented 23 times on an intermittent basis. On September 23 and 30, 1972, KMTC-TV broadcast a program entitled "Royal American Chinchilla." Both programs consumed approximately 30 minutes of broadcast time and were sponsored by business organizations bearing the same corporate names as the programs' titles. Both companies are engaged in commercially marketing chinchillas and chinchilla breeding and raising systems. The companies also arrange financing for persons interested in purchasing chinchillas.

4. In a December 13, 1972 response to a Commission letter of inquiry prior to the adoption of the Notice in the instant matter, licensee submitted scripts and program log samples. Licensee acknowledged that from January 31, 1970 until August 19, 1972 it had presented the "National Chinchilla" program and that on September 23 and 30, 1972, it had presented the "Royal American Chinchilla" program. Licensee noted that it had logged the programs "Other-Discussion", then "Agricultural-Discussion" with only eight or nine minutes being logged as commercial content.

5. The Notice of Apparent Liability was mailed to the licensee by Certified Mail—Return Receipt Requested. Although the return receipt indicates that the licensee received the Notice on August 29, 1973, the Commission's records indicate that the licensee has not made reply subsequent to the expiration of the thirty-day period prescribed by Section 1.621 of the Commission's Rules. Rather, as is its right under Section 1.621 of the Rules, licensee has chosen not to respond to the Notice of Apparent Liability, and stands on the facts of record established thus far in the proceeding.

6. In view of the foregoing, we find that the licensee of KMTC–TV has repeatedly operated in violation of the following sections of the Commission's Rules:

(a) Section 73.670(a)(2)(ii) provides that an entry or entries shall be made in the program logs showing an accurate reflection of "the total duration of commercial matter in each hourly time segment (beginning on the hour) or the duration of each commercial message (commercial continuity in sponsored programs, or commercial announcements) in each hour." Because the commercial and noncommercial segments of the programs were so closely interwoven as to constitute nothing more than commercial messages for the programs' sponsors, the entirety of each program should have been logged as commercial matter in accordance with the Rule. The constant references throughout the program to the marketability of individually-bred chinchillas, the repeated sales promotions for viewers to invest in the chinchilla animals offered by the programs' sponsors, and the lengthy commercial promotions for those sponsors made each of the programs considered herein entirely commercial. Licensee's failure, therefore, to log the entirety of each program as commercial matter indicates its violations of the Section 73.670(a)(2)(ii) on each of the three occasions within the one-year statute of limitation period when the programs were broadcast, i.e., August 19, September 23 and 30, 1972.

(b) Section 73.670(a)(1)(ii) of the Rules requires that the licensee enter in the program logs the beginning and ending times for each program unit broadcast. In this case, the licensee failed to enter the programs' ending times, thus violating this provision of the Rule on each of the three occasions the programs were broadcast.

(c) Section 73.670(a)(1)(iv) of the Rules requires that the licensee properly identify each program's source in the program log. The licensee here failed to make such an entry on each of the two dates on which the "Royal American Chinchilla" program was broadcast, i.e., September 23 and 30, 1972. In this regard, the Rule's requirement would have been met had the licensee entered the program's source as "recorded" or "REC", since the programs were taped and were made without the assistance or participation of local personnel or talent.

7. Section 503(b)(3) of the Communications Act of 1934, as amended, states that no forfeiture issued for violations of the Act or the Commission's Rules and Regulations shall be valid unless the apparent violations asserted in the Notice of Apparent Liability have occurred within one year of the date of the Notice's issuance. The Notice of

Apparent Liability was issued to the licensee here on August 16, 1973. The dates of the violations found herein occurred on August 19 and September 23 and 30, 1972, within the one-year limitation period defined in Section 503(b)(3). Additionally, the violations found herein were "repeated" within the terms and usage of Section 503(b)(1)(B) of the Act, having occurred on three occasions with respect to Sections 73.670(a)(2)(ii) and 73.670(a)(1)(ii), and on two occasions with respect to Section 73.670(a)(1)(iv). Thus, the conditions set forth by Section 503 of the Act, prescribing the issuance of a valid Order of forfeiture, have been fulfilled on the facts established by the record in this proceeding.

8. In accordance with the provisions of Section 503(b) of the Communications Act, as amended, and Section 1.621 of the Commission's Rules[1] IT IS ORDERED, That Midland Television Corporation, licensee of KMTC–TV, Springfield, Missouri, FORFEIT to the United States the sum of three thousand dollars ($3,000) for its repeated violations of Sections 73.670(a)(1)(ii), 73.670(a)(1)(iv), and 73.670(a)(2)(ii) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument, drawn to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Section 1.621 of the Commission's Rules provide, in pertinent part, as follows: "If the licensee . . . fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

FCC 74-549

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MOCATTA METALS CORP., COMPLAINANT *v.* ITT WORLD COMMUNICATIONS, INC., DEFENDANT	Docket No. 19799

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 6, 1974)

BY THE COMMISSION:

1. On July 13, 1973, the Mocatta Metals Corporation, 25 Broad Street, New York (hereinafter referred to as "Mocatta") filed a formal complaint against ITT World Communications, Inc., 67 Broad Street, New York, New York (hereinafter referred to as "ITT"). Mocatta filed its complaint with the Commission under the advisement of the District Court for the Southern District of New York wherein it had initially filed suit on these same facts. Mocatta's complaint in the District Court had been filed on June 25, 1973. In that suit the District Court issued two temporary restraining orders against ITT to prevent them from terminating Mocatta's service until such time as Mocatta had perfected its complaint before the Commission. Mocatta's complaint set out five legal grounds in support of its position:

(a) ITT's breach of contract to provide Mocatta a fully operational Simultaneous Voice Data Leased Channel including an alternative voice-data and four teletype channels, (the "System") violated ITT's FCC Tariff No. 43 ("the Tariff");

(b) The negligence of ITT in the installation and maintenance of the aforementioned communications system;

(c) ITT's violation of its statutory duties under Section 201 of the Communications Act of 1964, as amended;

(d) ITT's rendering of a bill in an amount substantially in excess of the amount owed by Mocatta;

(e) ITT's failure to comply with Tariff Sections C7.01, entitled "Cancellation for Cause", C12.02, entitled "Liability of Carrier", and C1.04, entitled "Description of Services".

Concomitant with its request that this Commission investigate the alleged unlawful practices of ITT, Mocatta also requested that we issue an injunction against ITT to prevent the carrier from terminating the communications for which Mocatta had contracted. In a Memorandum Opinion and Order released August 14, 1973 the Commission rejected Mocatta's request for an injunction, concluding that the circumstances of this case did not justify the relief requested. However, the Commission noted that it did have jurisdiction over the substantive issues raised by Mocatta's complaint. On August 7, 1973,

after a rehearing on the issuance of an injunction by the District Court and an appeal to the Court of Appeals, Second Circuit, ITT discontinued Mocatta's service, alleging as the reason non-payment of monies due. On August 21, 1973 ITT responded to Mocatta's Commission complaint.

2. The gist of Mocatta's complaint alleges that on November 23, 1971, ITT and Mocatta entered into an agreement whereby ITT was to provide a simultaneous voice-data channel including an alternative voice-data and four teletype channels to Mocatta within 90 days. That it was not until September 18, 1972 that service on the proposed communications system was initiated. That on October 25, 1972 Mocatta informed ITT that it would not pay the full amount billed for the system because in Mocatta's opinion the system still was not fully operational. That Mocatta offered to pay ITT one half of the amount billed, place the other half in escrow and have a third party arbitrate the amount that Mocatta should pay. That ITT informed Mocatta that notwithstanding any disagreements between the parties they would expect full reimbursement for services rendered over the ten-month period and pending payment of the bill would terminate its service to Mocatta. Mocatta further alleges that ITT's termination of the service would be in violation of the Communications Act of 1934, as amended.

3. In its reply, ITT asserted two affirmative defenses:

(a) Mocatta's claim before the Commission was in violation of Section 207 of the Act because it was pursuing a remedy for the same cause of action in two forums, and

(b) Mocatta's claim was barred by the Statute of Limitations set forth in Section 415(b) of the Act.

In its reply, ITT also issued a general denial to the allegations in Mocatta's complaint and specifically denied it was responsible for any poor service that may have been received by Mocatta. For reasons set forth in a Memorandum Opinion and Order, released December 4, 1973, the Commission rejected the two affirmative defenses raised by ITT in its reply. In this Order the Commission took no position on the substantive issues raised by either party. The Commission indicated that if Mocatta dismissed its June 25, 1973 court complaint against ITT, the issues raised in Mocatta's Commission complaint would be set for hearing. By letter, dated December 19, 1973, Mocatta informed the Commission that it would terminate the court action and seek its remedy exclusively before the Commission. The dismissal of Mocatta's District Court claim was complicated by the fact that ITT had filed a counterclaim in that action. On January 1974 the District Court granted Mocatta's motion to dismiss. As to ITT's counterclaim the Court issued a stay pending the Commission's resolution of the issues raised in Mocatta's Commission complaint with the requisite proof of dismissal of their claim before the District Court.

4. Because of numerous witnesses to be presented all of whom would be from New York, complainant requests that the hearings be convened in New York. However, whether or not field hearings will be necessary is a matter that we will leave to the Chief Administrative Law Judge upon Mocatta's showing of need. See 47 C.F.R. 0.152.

5. By letter dated February 20, 1974, ITT has requested that the Commission take note of the fact its counterclaim was stayed upon the condition that Mocatta expeditiously pursue its claim before the Commission. The Commission notes this fact and calls it to the attention of the Administrative Law Judge who will preside over this case.

6. Accordingly, IT IS ORDERED, That pursuant to Section 4(i), 4(j), 201, 203, 205, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, that this matter is DESIGNATED FOR HEARING at the Commission's offices in Washington, D.C.

7. IT IS FURTHER ORDERED, That without in anyway limiting the scope of the proceedings, it shall include inquiry into the following issues:

I. Whether ITT, as alleged by Mocatta, (a) breached its contract to provide Mocatta a fully operational System, (b) was negligent in the installation of the System, (c) rendered a bill substantially in excess of the amount owed by Mocatta and (d) failed to comply with Tariff Sections C7.01, C12.02 and C1.04.

II. Concerning the agreement entered into between ITT and Mocatta on November 23, 1971;

(i) Whether defendant failed to provide interstate or foreign communications service to complainant upon reasonable request therefore, in violation of Section 201(a) of the Act;

(ii) Whether defendant engaged in unjust or unreasonable practices in connection with providing interstate or foreign communications service to complainant, in violation of Section 201(b) of the Act;

(iii) Whether defendant made any unjust or unreasonable discrimination, prejudice, or disadvantage in the provision of interstate or foreign communications service to complainant, in violation of Section 202(a) of the Act;

(iv) Whether defendant made any charge or demand not set out in the tariff schedule then in effect in violation of Section 203(c) of the Act, or in any way violated Section 203 of the Act.

III. Whether complainant is entitled to any monetary damages under the foregoing issues, if so, the amount thereof.

IV. Whether the Commission should take any further action with respect to any violation of the Act that may be found under the foregoing issues, and, if so, the nature thereof.

8. IT IS FURTHER ORDERED, That Mocatta Metals Corp., ITT World Communications Inc. and the Chief, Common Carrier Bureau are made parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

104-043—74——4

FCC 74-611

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of NEW YORK TELEPHONE CO. For a Construction Permit for a New one-way Signaling Base Station on 152.84 MHz in the Domestic Public Land Mobile Radio Service at Buffalo, N.Y.	File No. 5950-C2-P(3)-69

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) Commission decision, May 24, 1972, released May 26, 1972, 35 F.C.C. 2d 140, reconsideration denied, 37 F.C.C. 2d 326 (1972); (b) Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit filed October 24, 1972 by Pocket Phone Broadcast Service (Pocket Phone) Inc. and Radio Relay Corp. (Radio Relay); (c) Motion To Remand filed May 16, 1973 by the Commission; (d) Order of Remand, dated May 24, 1973; (e) Supplemental Brief filed September 7, 1973 by New York Telephone Company (NYTELCO); (f) Brief filed September 7, 1973 by Pocket Phone and Radio Relay; (g) Response to Brief of Pocket Phone and Radio Relay filed September 17, 1973 by NYTELCO; and (h) Reply Brief filed September 17, 1973 by Pocket Phone and Radio Relay.

2. The matter is before the Commission at its request on remand from the Court of Appeals for the District of Columbia. We have carefully considered the additional pleadings and other materials filed and for the reasons set forth below we have determined that the public interest, convenience and necessity would be served by granting the NYTELCO application.

3. The identity of the original applicants and the services proposed by them are set forth in our decision of May 24, 1972, released May 26, 1972, 35 F.C.C. 2d 140. Briefly, Gerard T. Uht sought a construction permit for a new one-way signaling base station to be operated on 158.70 MHz in the Domestic Public Land Mobile Radio Service (DPLMRS) at Buffalo, N.Y.; NYTELCO sought a construction permit for a new one-way signaling base station to be operated on 152.84 MHz in the DPLMRS at Buffalo, N.Y.; and Pocket Phone (Radio Relay) sought modification of a construction permit for changes in a one-way signaling station operating on 35.58 MHz in the DPLMRS at Niagara Falls and Aurora, New York.

4. Each of the three applications was granted by our decision released May 26, 1972.[1] On October 24, 1972 Pocket Phone (Radio Relay) filed notice of appeal to the Court of Appeals for the District of Columbia Circuit. On May 16, 1973 the Commission through its General Counsel moved to remand the case to the Commission so that it might invite the filing of additional pleadings and, if necessary, set the matter for hearing. The case was remanded and on July 30, 1973 a letter was sent to the parties requesting the filing of additional pleadings addressed to a number of specified issues. In addition, NYTELCO was requested to furnish more specific information regarding its showing of need for its proposed service. Lengthy submissions were made by both paries. The substance of those pleadings is outlined below. These, together with the pleadings, decisions and other papers already on file were carefully considered in making our decision on the NYTELCO application.

5. In its brief, Radio Relay argues first that NYTELCO has failed to demonstrate the need for its paging service in accordance with the standards established in the *Long Island Paging* case.[2] It then sets forth several criteria contained therein. It does not state whether it believes an applicant must satisfy all of the criteria or whether some lesser showing might be permissible. It argues that the NYTELCO amended need showing of November 29, 1971 is "grossly deficient" under these criteria and for that reason a hearing should have been ordered to consider the need for NYTELCO's proposed service.

6. Radio Relay insists that the Commission may not consider the information submitted by NYTELCO in response to the Bureau's letter of July 30, 1973 except in an evidentiary hearing. It argues that NYTELCO had ample opportunity to submit such data and failed to do so. Further it contends that the Commission may not consider information other than that before it at the time it originally granted the applications. Radio Relay then contends that the information requested by the Bureau's letter of July 30, 1973 is an incomplete recitation of the information requested of the information required by *Long Island Paging*. It does not, however, contend that the NYTELCO *survey* is deficient under Long Island Paging standards.

7. Radio Relay next reiterates the policy of competition established for the DPLMRS in *Non-Broadcast Frequency Allocations* 1 RR 91:143 (1949) and points out that this competitive policy has been reaffirmed in a number of subsequent decisions. It argues, however, that the Commission misapplied its competitive policy in the 1968 Guardband [3] rulemaking. It takes the position that the real purpose of "competition" as the term was used in the 1949 allocations was to counter possible anticompetitive potentialities of AT&T and its affiliates and not to place MCC's [4] and wireline carriers in the same competitive position. Radio Relay points to language in the Second Circuit

[1] *Gerard T. Uht*, 35 F.C.C. 2d 140, reconsideration denied, 37 F.C.C. 2d 326 (1972).
[2] 30 F.C.C. 2d 405 (Review Board) (1971), review denied, 32 F.C.C. 2d 235 (1971), reconsideration denied, 34 F.C.C. 2d 216 (1972).
[3] Report and Order in re Amendment of Part 21 of the Commission's Rules with respect to the 150.8—162 MHz band to allocate presently unassignable spectrum to the Domestic Public Land Mobile Radio Service by adjustment of certain band edges. Docket No. 16778, FCC 68-515; 12 F.C.C. 2d 841 (1968); reconsideration denied 14 F.C.C. 2d 269 (1968); aff'd sub nom. *Radio Relay Corp.* v. *F.C.C.* 409 F. 2d 322 (2d Cir. 1969), hereinafter Guardband.
[4] Miscellaneous Common Carrier, 47 C.F.R. § 21.1.

decision upholding the Guardband rulemaking wherein the court emphasizes the importance of an analysis of anticompetitive issues in each application for a guardband frequency. This and the imposition of certain strictures upon wireline DPLMRS operations are said to be in accord with the original purpose of "competition" as Radio Relay defines it. It concludes that the Commission's competitive policy established in Guardband is defective in that it *assumes* competition to be of advantage.

8. Radio Relay contends that under *Long Island Paging* and previous cases an applicant seeking to enter a market already occupied by another carrier must show affirmatively that existing carriers cannot satisfy all demands for service. A number of factors found important in the *Long Island Paging* case are set forth including: the degree of overlap of the two systems, the problems encountered by the existing station in serving the area, the capacity of the existing system, the efforts made by the existing station to promote its service and its unprofitable operations. Radio Relay does not allege that it has had difficulty serving the area, that it has large unused capacity or that efforts to promote its system have been fruitless. Radio Relay contends that all types of paging services are presently available in Buffalo and that existing carriers are capable of satisfying all present and potential demands for service. NYTELCO entry into this market is viewed as disastrous in what is termed the "depressed economic condition" of Buffalo. The standard proposed by Radio Relay for determination of the need issue would require the potential market entrant to prove that existing carriers were both unable and unwilling to meet any reasonably anticipated demand for service. In addition Radio Relay would allow existing carriers "reasonable time" to expand their present services before a new carrier could be considered. A number of states, it is said, protect existing carriers unless it is shown that they refuse to keep pace with demands for service. However, Radio Relay does not contend that NYTELCO does not have state approval to enter the Buffalo market or that such entry would be in violation of the statutes or public policy of New York.

9. Radio Relay argues that the Commission should consider in a hearing the anticompetitive aspects of NYTELCO entry into the Buffalo Paging market and suggests that the only appropriate forum for resolution of such issues is an adjudicatory hearing. Further it suggests that anticompetitive conduct by NYTELCO found in *Better TV, Inc., of Duchess County*, 31 F.C.C. 2d 939 (1971) should be considered in the light of *Uniform Policy on Violation of Federal Law*, 1 RR 91:495 (1951) and may possibly be disqualifying here. Finally, it argues that anticompetitive conduct of other Bell System Companies should be considered in light of *Uniform Policy* and be placed in issue in a hearing on the NYTELCO application for paging facilities in Buffalo.

10. NYTELCO, in its supplemental brief argues that the issues raised by the Bureau in its letter of July 30, 1973 (and by Radio Relay in its brief) were decided in the Guardband rulemaking. It contends first that the Guardband rulemaking requires that both MCC and wireline applications be granted unless the market in question will support only one carrier of minimum economic size. Further, it posits

that a hearing is justified on that issue only if the party opposing the application of the new carrier adduces specific engineering and economic data rather than mere conclusory allegations of losses. NYTELCO argues that such a competitive policy satisfies the requirement of *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), requiring that the Commission, before establishing a policy of competition between communications common carriers, have "reasonable expectation that competition may have some beneficial effect." 346 U.S. 97. NYTELCO recites the finding of the Commission on remand in the *RCA* case that competition between international radio-telegraph carriers had produced real benefits. It notes the Commission's rejection of the argument that existing carriers should be allowed to handle all demand noting that such a policy would enable existing carriers to forestall competition indefinitely by maintaining more capacity than necessary at any particular time. NYTELCO contends that the Guardband decision reaffirmed a Commission policy of MCC/wireline carrier competition begun in 1949 in its allocation of separate frequencies for the two types of carriers. Also, it states that the Commission in Guardband analyzed the effects of its competitive policy finding that the two types of carriers were competing successfully in a number of large cities and that the policy had resulted in increased variety in the services rendered. NYTELCO contends further that Guardband expressly established the rule that both MCC and wireline carrier applications should be granted unless the market in question can support only one carrier. It does not agree that either the Guardband rulemaking or the Court of Appeals decision affirming it suggest that the Commission can deny a wireline application on grounds weaker than economic mutual exclusivity or that a hearing can be had on such an issue based on the bare allegation that existing carriers have lost money. It strongly contests the position that it must show that existing carriers cannot physically satisfy all demands for service contending that such a rule confers monopoly status upon all existing carriers in direct contravention of the Commission's repeatedly expressed competitive policy.

11. Regarding the elements of an adequate showing of public need for its proposed service NYTELCO contends that such a showing may be made in any manner reasonable under the circumstances of the case. Further, it contends that the indicia of need it has presented, including the market survey, clearly constitute an adequate showing under Commission rules and decisions. It also proposes the use of presumptive findings of need based upon area population but does not seek to rely upon such a presumption in this case. It does not concur with the contention of Radio Relay that a hearing must be held to resolve the economic and need issues. In support it contends that Radio Relay has made bare allegations of economic exclusivity and lack of need without alleging any probative engineering or economic facts tending to prove this contention. Radio Relay's contemporaneous application to expand its present facilities is pointed to as contradicting its allegations regarding lack of need. It observes further that Radio Relay has not contested the expansion or building of new facilities by other area MCCs. It believes that this demonstrates that Radio Relay's true

position is that wireline carriers should not be allowed to enter markets already occupied by one or more MCCs.

12. NYTELCO contends finally that the claims of anticompetitive conduct by it and other Bell System companies do not justify a hearing on its application to operate paging facilities in Buffalo. With regard to the *Better TV* case it insists that no inferences of anticompetitive behavior may be drawn and refers to the dissent in that case wherein three Commissioners stated that "the great weight of the evidence in the proceeding demonstrated that NYTELCO acted in good faith in a situation where its legal obligations were not clear". 31 F.C.C. 2d 970, 975 (1971). It contends further that regardless of the inferences drawn from *Better TV*, a case involving CATV channel offerings, the Guardband rulemaking placed restrictions upon wireline carrier operations which eliminate any competitive advantage. NYTELCO insists that it has honored both the letter and spirit of those conditions and cites as examples two cities where it is engaged in competition with MCCs. It also set forth its plan for promoting and marketing its paging service in the Buffalo area. Finally, NYTELCO argues that anticompetitive conduct of other Bell System companies was considered in Guardband and found to be insubstantial.

13. Radio Relay in its reply brief disagrees with the NYTELCO suggestion that some type of presumptive need rule be established in areas of large population. It contends that such a presumption is contrary to Commission policy and notes that it was specifically rejected in *Long Island Paging*. It restates its position that *Long Island Paging* is directly applicable in a wireline/MCC contest contending this time that *all* of the criterial set forth in its previous brief must be satisfied. It further contends that the NYTELCO need showing fails to satisfy these criteria assuming that the market survey submitted by NYTELCO is not considered. Radio Relay strongly disagrees with the NYTELCO contention that the Commission has encouraged competition between communications common carriers either generally or specifically between wireline carriers and MCCs in the DPLMRS. It contends that the markets in which competition is encouraged represent exceptions to the general rule that such competition is wasteful. Radio Relay also questions the conclusion that the Guardband rulemaking represented a firm reaffirmation of a policy of MCC/wireline carrier competition. In support it observes that the bulk of the two decisions in Guardband were devoted to limiting any inherent competitive advantages of wireline carriers. Radio Relay also contests the position of NYTELCO that its application can be denied only on grounds of economic mutual exclusivity. It points out a number of alternative bases for denial including inadequate need and anticompetitive conduct. It argues further that the Guardband rulemaking did not change prior concepts of economic impact or exclusivity and that previous cases involving contests between two or more MCCs are directly applicable to post Guardband conflicts between MCCs and wireline carriers. Radio Relay renews its argument that the capacity and financial health of existing carriers in a particular market are matters that should be considered in a hearing on the application of a wireline carrier seeking entry into that market. Particularly, it argues for

application of a number of pre-Guardband cases and *Long Island Paging*, which, it contends, require a showing by the prospective carrier that existing facilities in the market cannot accommodate all demands for service. Finally, Radio Relay renews its contention that anticompetitive conduct by NYTELCO in its offerings of CATV channel service must be considered in a hearing on its application for paging facilities. It alleges that NYTELCO fails to offer any basis for the claim that the safeguards incorporated within the Guardband decision obviate the possibility of anticompetitive conduct in this service. It quotes extensively from the *Better TV* decision and concludes that the conduct described therein requires a hearing to determine NYTELCO's eligibility for a license.

14. In its response NYTELCO contends that no hearing is necessary on the question of need for the service proposed in its application. It points out that each of the alleged defects in its amended need showing are remedied by consideration of the survey furnished in response to the Bureau's letter of July 30, 1973. In addition it insists that the Commission is entitled to consider the survey in other than the context of an evidentiary hearing. And it strongly disagrees with Radio Relay's contention that *Long Island Paging* requires submission of *all* criteria set forth in its brief. Regarding the Commission's policy of MCC/wireline competition NYTELCO argues that the Guardband decision correctly settled the issue of competition in the general case. It further contends that this general competitive policy is precisely what Radio Relay seeks to relitigate in this licensing proceeding. It argues that because this general issue was considered by both the Commission and the Court of Appeals in Guardband, the issue has been decided and is not properly in question here. NYTELCO contends that Radio Relay's argument that a prospective carrier must demonstrate that existing carriers cannot and will not satisfy all demands for service ignores the clear holding of Guardband that required granting of the new application unless only one carrier was economically viable. Finally, it repeats its argument that the claims of anticompetitive conduct raised by Radio Relay do not justify a hearing.

15. We have carefully considered our previous decision and the numerous arguments raised in the pleadings of both parties and have determined that we will grant the NYTELCO application without first holding an evidentiary hearing. The reasons for our action are set forth in detail in the paragraphs below.

SURVEY

16. Radio Relay's objection to consideration of the additional need data submitted by NYTELCO is without merit. The additional data [5] was submitted in response to a letter from the Common Carrier Bureau dated July 30, 1973 requesting specific information regarding need for service. Radio Relay contends that the survey is an amendment to the NYTELCO application and as such is untimely. Radio Relay's position is not well taken because the applications have not been set for evidentiary hearing. Even if the survey is treated as an amendment it is

[5] The data was contained in a market survey dated June, 1970 and conducted by Strickland-Legget Research, Inc.

not, under our rules, a major amendment [6] and may therefore be submitted as a matter of right prior to the adoption of an order designating the application for hearing.[7] Further, any Failure by NYTELCO to submit information requested by the Commission would seriously jeopardize its application.[8] NYTELCO was required to submit the information and we shall consider it.

NYTELCO NEED SHOWING

17. Radio Relay urges that the NYTELCO showing of need for its proposed service is deficient. We do not agree. Under the principal case relied upon by both parties the need for paging service may not be presumed but must be proved in each case. *In re Application of Edith V. Joyce, et al. d/b/a Long Island Paging*, 30 F.C.C. 2d 405 (1971), aff'd 32 F.C.C. 2d 235 (1971). In that case a paging application was rejected for failure to do more than make unsupported allegations of need. The Review Board found that Long Island Paging had failed to demonstrate need by any of the "several approaches available to it". 30 F.C.C. 2d 408. It then listed the types of evidence which would be considered persuasive: (1) "statistics or specific facts tending to show need, more specifically, a showing as to the nature and economics of the service area", 30 F.C.C. 2d, 408, 409; (2) "demographic or statistical evidence showing the nature and numbers of industries, businesses, professions, and trades in the service area," 30 F.C.C. 2d 409; (3) "information on the identity and occupation of persons making service inquiries together with a statement as to whether or not costs were quoted and whether definite commitments were made," 30 F.C.C. 2d 410; (4) "evidence as to the success or failure of other carriers offering paging services in the same market." 30 F.C.C. 2d 411.

18. The evidence submitted by NYTELCO including the Strickland-Leggett report must be examined with reference to these criteria. NYTELCO's original need showing consisted of a statement of survey results indicating a potential demand for 9,000 units. Later in response to the Commission's letter of July 30, 1973 NYTELCO submitted a report in support of its earlier statement. The report contains a survey of industries, businesses, professions and households in the Buffalo area. Information is given regarding the survey methodology, questions asked and representations made. Costs were quoted and the report demonstrates the variation in demand for paging units in this market over a representative range of service charges. It also details the degree of interest expressed by each of those surveyed, the considerations that would go into a decision to order Bellboy service and the length of time before service would be ordered. From the data collected the report concludes that there is a potential market for more than 9,000 paging units in the Buffalo area. Radio Relay makes no allegations that the survey results are inaccurate or that the methodology employed was improper. It argues only that the report may not be con-

[6] 47 C.F.R. 21.23(c).
[7] 47 C.F.R. 21.23(a).
[8] 47 C.F.R. 21.20(c).

sidered. We find that the survey sets forth sufficient information for a determination that a need for the service proposed by NYTELCO exists in Buffalo, New York.

EXISTING CARRIERS

19. Section 1 of the Communications Act [9] states that it is the purpose of the Act, *inter alia*, to provide to all people of the United States a rapid and efficient communications service. Section 309(a) of the Act [10] requires that the Commission, before granting a license application, determine that the public interest, convenience and necessity would be served by the grant. In each service we must fashion rules and procedures that effectively implement these standards. In the paging service, application of these standards requires that we make available, to the extent that limited frequency spectrum space allows, paging services to all who need them. In previous cases involving DPLMRS carriers we have focused consideration upon the showing of need for service made by the prospective carrier and the ability or lack of ability of existing carriers to meet that demonstrated need. In *Associated Telephone Answering Service*, 7 F.C.C. 2d 143 (1967), we held that a new carrier seeking entry into a market already occupied by one or more carriers was required to demonstrate that existing carriers were unable to meet the demand for service. We no longer apply this standard. It does not adequately serve the public interest standards that Congress has directed us to apply.[11]

20. We shall apply the following policy in consideration of applications by MCC's or MCC's and wireline carriers in this service: If the applicant for a new frequency can demonstrate substantial unsatisfied need for service by one or more of the alternative methods set forth in *Long Island Paging* and existing carriers fail to raise substantial and material questions regarding that need showing, then no hearing will be required on this issue. Where a prospective carrier surveys a particular market and demonstrates that substantial unsatisfied demand exists despite the presence of other carriers offering the same or similar services, his application will be granted absent some other disqualifying factor. The prospective market entrant will not be required to show that existing carriers cannot satisfy all demands for service. This rule does not operate to the disadvantage of existing carriers who identify the needs of the community in which they operate and serve those needs. Only where this is not the case is it possible for a prospective carrier to identify substantial unsatisfied demand.

21. Application of this policy is supported by our experience in this and other cases. In the Guardband rulemaking we discussed the case of Contact of Washington. As stated there, Contact had, over a period of nine years, attracted 91 subscribers for its paging operation. During the next six years C and P Telephone was able to gain more than 3,000

[9] 47 USC § 151 (1934), as amended.
[10] 47 USC § 309(a) (1934), as amended.
[11] In the Reconsideration of our Order granting the Uht, Pocket Phone, and NYTELCO application we discussed the effect of our long established policy of competition in this service upon the holdings in *Associated Telephone Answering Service* and other cases. In light of the holding of the Court of Appeals in *Hawaiian Telephone Co.* v. *F.C.C.*, No. 73-1018 (D.C. Cir. May 3, 1974) we will not rest our discussion of this issue upon the merits or demerits of our competitive policy.

customers. The public interest was clearly served in that case by entry of the new carrier into the market. A parallel situation exists in the market in question here. Information for the year 1972 furnished to the Commission by Buffalo area MCC's reveals that approximately 750 one-way paging units were being served.[12] The market survey conducted for NYTELCO in 1970 indicated a potential demand for 9,000 units. There is clearly a substantial unserved demand in this market. Application of our former policy might allow existing carriers to exclude NYTELCO from this market while providing absolutely no assurance that the public in Buffalo would be adequately served. For this reason we find that the public interest, convenience and necessity would be served by allowing NYTELCO to develop its service in the Buffalo market. A hearing is not required on this issue. Radio Relay has raised no substantial and material questions regarding the NYTELCO showing of need as set forth in the 1970 market survey.

ECONOMIC HARM

22. Radio Relay alleges repeatedly that NYTELCO entry into the Buffalo, New York paging market will have disastrous effects upon area MCC's. In our Memorandum Opinion and Order granting the Uht, Pocket Phone, and NYTELCO applications and in our reconsideration of that order we found that Radio Relay's allegations of economic harm were essentially generalized objections to wireline carrier entry into any market occupied by MCC's. Further, we found that this issue was thoroughly considered and settled in the Guardband rulemaking. The allegations relating to the economic condition of Buffalo, as we stated, do not, without more, give rise to an inference of lack of need for paging services in that market. In the supplemental pleadings requested by our letter of July 30, 1973 Radio Relay has again failed to raise substantial and material questions regarding economic injury to it and other area MCC's caused by NYTELCO entry into the Buffalo paging market. Radio Relay continues to make general allegations of harm, the majority of which relate to wireline entry into any market. Those issues were considered and decided in the Guardband rulemaking and do not justify a hearing on this application.

COMPETITIVE PRACTICES

23. Radio Relay makes a number of allegations of anticompetitive conduct by NYTELCO and other Bell system companies and also regarding the anticompetitive impact of NYTELCO entry into the Buffalo paging market. These allegations will be dealt with separately.

24. Two of these issues were decided in the Guardband rulemaking. First, Radio Relay's argument against NYTELCO entry into the Buffalo market is nothing more than a generalized objection to wireline carrier entry into any market already occupied by MCC's. It quotes extensively from the Guardband rulemaking wherein we

[12] FCC Form L's for area MCC's contain the following information on line 4(f): Pocket Phone (KEA 777)–142 mobile units served; Tel Page (KEC 521)–111 mobile units served, (KRM 676)–281 mobile units served; Uht (KEK 289)–36 mobile units served, (KTS 238)–142 mobile units served; Selective Page (KEK 276)–42 mobile units served. All data is for the year ending December, 1972. Form L's for 1973 have not yet been received for all of the above stations.

pledged to consider such allegations at the time of application by a particular wireline carrier. But in neither its brief nor its reply does it attempt to support its contention regarding Bell entry to the particular Buffalo market in question here. Its original Petition to deny [13] contains a breakdown of its claims regarding the dangers of wireline entry. We will address each:

(a) At paragraph 10 Radio Relay voices concern over the possibility of a wireline carrier entering a particular market while the prospective MCC entrants engage in lengthy hearings to determine which carrier will be licensed for the available frequencies. Radio Relay directs attention to our Guardband decision but fails to point out that the precise question it raises was dealt with in both the Commission decision and the following court case and resolved by creation of the so-called "head-start" doctrine. Most notably it fails to suggest that a "headstart" problem is presented by the NYTELCO Buffalo application.

(b) In paragraph 11 of its original petition Radio Relay discusses a number of possible inherent advantages of wireline carriers including financial resources, existing facilities, personnel, and the "Bell image". Each of these factors was raised and carefully considered in the Guardband rulemaking. Radio Relay makes no attempt to relate any of these contentions to NYTELCO or to the Buffalo market. They are thus the same contentions that were considered and resolved in Guardband.

(c) At paragraph 7 Radio Relay contends that NYTELCO, if licensed, would "usurp" the entire one-way signaling market in Buffalo. Absolutely no factual data or logic is offered to substantiate such a claim.

(d) At paragraph 9 Radio Relay recalls language in the Guardband rulemaking wherein we stated that its individual areas of concern could be considered more adequately in an adjudicatory framework, that is, in the context of a wireline application for one of the Guardband frequencies. But this did not constitute an offer to reconsider the issues of general applicability decided by Guardband. Radio Relay would have us consider the effects of NYTELCO entry upon Buffalo area MCCs. But it offers nothing more than generalized allegations which relate to entry of any wireline carrier into any paging market. We do not intend to reconsider this question in the abstract each time a Guardband application is made. We shall not require that a hearing be held on this application because there do not exist substantial and material questions indicating that the public interest would not be served by issuance of a license for operation of paging facilities by NYTELCO in the Buffalo, New York area.

25. Second, the question of MCC failures due to wireline carrier presence in the same market was similarly considered and found unpersuasive in the Guardband decision.

Thus, we note that the MCC's own example, Contact of Washington, referred to as a once "up and coming paper" which allegedly suffered an economic reversal after the entry of "Bellboy"

[13] Petition to Deny application of NYTELCO, received May 14, 1969.

in the area, was at best able to attract over a 9-year period (from 1953 when licensed to 1962, "Bellboy's" entry) only a very limited number (91) of subscribers, while the C&P Telephone Co. has been able to gain approximately 3,300 customers on its developmental system in a 6-year period. Apparently the potential for attracting customers existed, since C&P attracted them after it offered its service. Some explanation is due at least as to why Contact did not, prior to the inauguration of "Bellboy" service, secure such customers in the first instance: what its potentials were; how specifically these potentials were diminished by the entry of the Bell System; and how other systems would be comparably affected. The mere allegation that the entry of C&P 9 years after Contact adversely affected the latter is certainly not in light of the above facts, convincing proof of the inability of the nonwireline carrier to compete. The situation described with respect to the west coast is similarly not convincing. In April, 1962, Pacific Northwest Bell commenced operation of the second developmental station in the 150-Mc/s band in Seattle, Washington, and in approximately 2 years of operation was serving upwards of 1,800 customers. Tele-Comm, Inc. (a nonwireline carrier), was licensed to operate a one-way signaling station in Seattle in September 1963, but by the end of 1965 had gained no subscribers. Here, too, the mere juxtaposition of the dates and the failure of Tele-Comm, Inc., to gain customers does not without more data than alleged provide proof of inherent inability of nonwireline carriers to compete. Hence, a conclusion cannot be drawn that the experience of Contact of Tele-Comm is indicative of the "fate" other MCCs may expect if competition between them and wireline carriers is permitted. Report and Order, Docket No. 16778, 12 F.C.C. 2d 841, 849 (1968).

26. Radio Relay contends that instances of alleged anticompetitive conduct by AT&T and Bell affiliates other than NYTELCO should be considered in a hearing on NYTELCO's application to operate paging facilities in Buffalo. Where such conduct relates to communications markets other than paging it is simply too remote, without more, to be germane here. Action by some sister Bell operating company should not necessarily be considered as bearing on the character qualifications of NYTELCO. It is not suggested that NYTELCO is in a position to control the behavior of associated companies and it should not be charged with conduct which is beyond its control. Allegations of anticompetitive conduct by other Bell companies in paging markets may be useful in showing some overall policy or practice. However, the specific allegations relating to Washington, D.C. and Seattle were dealt with in Guardband and, as stated above, MCC failures there were not clearly related to the presence of a wireline carrier in the market.

27. Finally, Radio Relay contends that the anticompetitive conduct by NYTELCO found in *Better TV, Inc. of Duchess County*, 31 F.C.C. 2d 929 (1971), is relevant in considering its application to operate paging facilities in Buffalo. In *Better TV*, NYTELCO was denied a certificate of public convenience and necessity under § 214 [14] to con-

[14] 47 USC § 214 (1934), as amended.

struct and operate channel facilities for cable TV. The denial rested upon a finding that NYTELCO had exerted improper pressure upon cable TV operators to lease channel service rather than effecting simple pole attachment agreements. In *Uniform Policy on Violations of Federal Law*, 1 RR 91:495 (1951), we set forth guidelines for consideration of law violations including the antitrust laws by prospective licensees. These guidelines encompass the following questions:

(1) whether a decree has been entered eliminating the practice,
(2) whether the violation was innocent or deliberate,
(3) whether it was isolated or recurring,
(4) the recency of the violation,
(5) the conduct of the applicant in the interim period, and the
(6) finality of the decision finding the applicant guilty of such conduct.

Although actual violations of the law were not in issue in *Better TV* these guidelines provide a convenient method for analysis of the conduct revealed in that case. First, a "decision" has been entered eliminating the practice in those communities in that NYTELCO was denied § 214 certification for its channel facilities. Second, the conduct was clearly a "deliberate" attempt by NYTELCO to preserve its position in that communications market. The conduct was "recurring" in that there were a number of communities involved in the *Better TV* case. However it was discontinued prior to the decision in *Better TV* and there is nothing before us indicating further such conduct following that decision. We do not find NYTELCO's conduct revealed in *Better TV* to be disqualifying here. The conduct resulted in denial of its § 214 certificate. The denial removed the possibility for such practices with respect to those CATV operators. Radio Relay has not alleged that NYTELCO has engaged in such practices subsequent to *Better TV* or our adoption of Rule 63.57.[15] In addition, it is not clear that the type of conduct involved in *Better TV* is indicative of that to be expected in the Buffalo Paging market. The type of service is different, NYTELCO faces entrenched competition, and its conduct is subject to the limitations set forth in the "Guardband", rulemaking which are designed to neutralize competitive advantages. Finally, NYTELCO has, in its supplemental brief, set forth the marketing approach it plans to take with respect to its service.[16] As set forth the plans do not appear to contravene the guidelines established in Guardband.

28. In summary, we find a demonstrated need for the service proposed by NYTELCO. Further we find NYTELCO to be financially, technically, legally and otherwise qualified to construct and operate these facilities. For the reasons outlined above we do not find the conduct in issue in *Better TV, Inc. of Duchess County* to be disqualifying here. Radio Relay's allegations regarding the alleged disasterous impact of NYTELCO operation in Buffalo are not persuasive. They lack both specificity and relevance to the Buffalo, New York market and are

[15] 47 C.F.R. § 63.57.
[16] In particular, NYTELCO proposes identification and promotion of Bellboy Service through the Yellow Pages, trade fair displays, personal calls and mailings separate and apart from monthly telephone bill mailings. The costs of such promotion as well as all other capital costs and expenses associated with Bellboy will be taken into account in determining rates for Bellboy service.

essentially the same generalized arguments that were considered in Guardband. And as we pointed out in our decision granting the NYTELCO, Uht, and Pocket Phone licenses, any concrete facts that arise concerning anticompetitive conduct or other matters may be brought to light at the time NYTELCO applies for renewal of its license or in a petition requesting the revocation of its license.

29. In view of all of the foregoing we do not find that there are substantial and material questions of fact suggesting that the grant of the NYTELCO application for one-way paging facilities in Buffalo, New York would be inconsistent with the public interest, convenience and necessity.

30. Accordingly, IT IS ORDERED, that the application (File No. 5950–C2–P(3)–60) of the New York Telephone Company for a construction permit for a new one-way signaling system on 152.84 MHz in the Domestic Public Land Mobile Radio Service at Buffalo, New York, is GRANTED, and the Petition to Deny by Radio Relay and supplements thereto are DENIED.

31. IT IS FURTHER ORDERED, That the construction permit of NYTELCO is conditioned in that the grantee shall offer to make available to the non wireline common carriers for one way signaling purposes the same dial access interconnection facilities as those utilized by the wireline common carriers in the community; further that the charges for such interconnection and all other facilities of the wireline company used by the non-wireline carriers in the one-way signaling service on frequencies 152.24 MHz and 158.70 MHz, shall be identical with those costs used by the wireline company on frequencies 152.84 MHz and 158.10 MHz in computing its own charges on the same distances when it offers a competitive service, or where distances are different, the same, per mile basis; and finally if a wireline carrier offers or purports to offer any free or reduced rate service in connection with its one-way signaling service, it shall provide the identical service so offered or purported to be offered to customers of any competing non-wireline carrier at the same reduced rate or free of charge.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-492

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
PHILCO-FORD CORP.
Concerning Waiver of Comparable Tuning Rules

MAY 14, 1974.

This is in response to your letter of March 26, 1974 concerning waiver of the comparable television tuning rules to permit shipment of 14,000 units of one receiver model to be produced between July 1 and December 31, 1974. A waiver of the 100% compliance requirement, effective July 1, 1974, is required because the receivers combine a detented VHF tuner with a continuous UHF tuner. Up to 3000 of these 14,000 units would be installed by Philco in hospitals, nursing homes, hotels, motels and educational institutions, subject to the usual conditions on their use in or removal from the institution designed to assure that their use will have no adverse effect on UHF television broadcasters. The remaining units would be sold in the general market for use in the home, where their use would adversely effect UHF viewing.

The case made by Philco for grant of the waiver is one of hardship, based on a series of adverse developments from 1972 to date. These include a decision in 1972 to go to all solid-state production; a restructuring of manufacturing facilities, which, among other things, would have eliminated the capacity to produce hybrid receivers; a subsequent inability to obtain a supply of solid state components sufficient to maintain a full product line; a partial reversion to hybrid receiver production, at a loss, at a plant which was to have been closed; a sharp drop in color receiver sales in January and February 1974; and abortive negotiations with White Consolidated Industries, whereunder White would have taken over a substantial part of Philco-Ford's consumer product (including its television receiver) business. The end result of these developments was the closing of the hybrid receiver plant (to put an end to very sizable losses) and an agreement with another receiver manufacturer to assemble some 25,000 chassis from components inventoried at that plant. However, only 11,000 chassis can be furnished to Philco in time for final assembly prior to July 1, 1974. The remaining 14,000 units are the subject of this waiver request. In the event the waiver is denied, Philco estimates direct costs to the firm of $350,000 and an indirect loss of revenue extending to millions of dollars and a substantial portion of total receiver sales.

The petition places the Commission in an unfortunate position. We are, on the one hand, extremely reluctant to grant any petition for waiver of the comparable television tuning rules extending beyond July 1, 1974, the date for 100% compliance. Absent the most compelling showing, we will not give favorable consideration to waiver

requests extending beyond that date. On the other hand, the hardship situation presented by the Philco petition is in fact compelling. We are faced on the one hand with the disturbing fact that 14,000 non-comparable receivers would enter the market (not a large share of the market to be sure, and yet not insubstantial), and on the other, with the very serious repercussions for Philco if the waiver is denied, at a time when receiver sales are declining and the competitive structure of the receiver manufacturing industry is contracting. In the circumstances, we see no realistic alternative but to grant the Philco request, however reluctantly.

In view of the foregoing, Philco-Ford Corporation is hereby authorized to ship 14,000 units of one non-comparable 18V color television receiver model [1] to be produced between July 1 and December 31, 1974. Such receivers shall be shipped to distributors within 60 days after production.

Commissioners Reid and Hooks dissenting.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

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[1] Basic model number C4563BWA and other receivers, carrying other numbers, which are functionally identical but differ cosmetically.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WRIK–TV, WAPA–TV, WKAQ–TV, WKBM–TV
Request for Inspection of Annual Financial Reports

MAY 31, 1974.

1. This ruling concerns requests for inspection of F.C.C. Forms 324, Annual Financial Reports. On September 19, 1973, Ponce Television Corporation (WRIK), licensee of Station WRIK–TV, Ponce, Puerto Rico, filed a Petition for Declaration of Policies with Respect to Television Service in Puerto Rico. The Petition involves WRIK's request (made originally in March, 1971 and subsequently withdrawn and dismissed with prejudice shortly after hearing designation in March, 1972) [1] that the station be allowed to move its transmitter to a point closer to San Juan, Puerto Rico's major city. WRIK–TV and three other stations (WAPA–TV and WKAQ–TV, San Juan and WKBM–TV, Caguas-San Juan) provide the bulk of Puerto Rico's TV programming. As there is practically no mainland network coverage in Puerto Rico (due to linguistic and other difficulties). WRIK petitioned that it and the other major stations are really a Puerto Rican "network" "and that *competitive equality* among them has the same high importance here as the Commission has recognized generally in connection with the three mainland U.S. national networks". (emphasis in original)[2] WRIK suggests that therefore equal access to the San Juan market is required for all four of the "flagship" stations and in its petition requests basically that the Commission issue a policy statement enunciating this "concept of equality for the flagship stations of island-wide systems (or networks)" as "a matter of high importance not to be cast aside without very strong countervailing reasons' ".[3] WRIK's Petition is resisted vigorously by the other three "flagship" stations.

2. In its Petition WRIK clearly injects a financial issue into the controversy. According to the Commission's Notice of Inquiry of Proposed Rule Making or Proposed Statement of Policy, WRIK contends that exclusion from full San Juan coverage denies it "'at least half the market opportunities on the island', which precludes its long-term viability; and that as a result it has had staggering losses, totalling nearly $8.5 million in the years 1970–1972, requiring cash advances from the parent United Artists of about that amount in three years

[1] See Ponce Television Corp., 33 F.C.C. 2d 940 (1972).
[2] Notice of Inquiry and Notice of Proposed Rule Making or Proposed Statement of Policy, March 20, 1974, pp. 1–2.
[3] Id., p. 2.

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and a total of more than $10,000,000 by the end of 1973 (all despite higher than average program expenses ranging from $2,650,000 to $2,856,000 per year. . . .). It is stated that the station's survival is jeopardized, and it cannot continue these losses much longer; the survival of outside stations as well would thus be jeopardized." [4] Apparently none of the other three stations has raised an economic issue.

3. On March 20, 1974, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making or Proposed Statement of Policy in the matter (FCC 74–253, Docket No. 19974). The Notice was instituted to explore questions, and possible approaches, generated by the WRIK Petition. The Notice asked interested persons to file comments on or before April 22, 1974 and reply comments on or before May 3, 1974 (It is my understanding that these deadlines have been extended).

4. Paragraph 21 of the Notice of Inquiry contains the following language, germane to this ruling:

> 21 *The economic situation and prospects of WRIK–TV*
>
> While we do not here attempt to spell out the showings which will be required in this matter, it appears likely that the economic situation and prospects of WRIK–TV may well be an important part of the case, both as the need for and the propriety of the "advance ruling" requested and as to the ultimate merits of its transmitter move proposal. The Commission will consider the data contained in stations' annual financial reports, and we will assume that WRIK agrees that such data for WRIK–TV may be made public to the extent necessary to support the decision reached. The same assumption will be made as to other Puerto Rican licensees who participate in the proceeding.

5. By letter of March 28, 1974, counsel for WAPA Broadcasting Corporation (WAPA), licensee of Station WAPA–TV, submitted a request for inspection of all Annual Financial Reports (FCC Form 324) filed in behalf of licensee for WRIK–TV. On the same date WAPA filed a Petition for Partial Reconsideration, asking that the last sentence of Paragraph 21, above, be deleted therefrom.

6. By letter of April 1, 1974, counsel for WRIK requested inspection of Annual Financial Reports submitted by: WAPA; Telemundo, Inc., licensee of WKAQ–TV (WKAQ); and American Colonial Broadcasting Corporation, licensee of WKBM–TV (WKBM). WRIK expressed no opposition to revelation of its Annual Financial Reports to other participants "if the reports of each of the participants which is a Puerto Rican licensee are revealed to WRIK." Pursuant to § 0.461(b) of our Rules, 47 CFR § 0.461(b), counsel for the stations were invited to comment on the requests for financial disclosure.

7. On April 3, 1974, counsel for WRIK filed an Opposition to Petition for Partial Reconsideration, citing Paragraph 21, above, as indication that the Commission considers the financial status of all four stations relevant to the inquiry; additionally WRIK in its Opposition discussed the relevance and necessity of its inspection of the Financial Reports of the other three stations. On the same date WRIK filed a Motion for Expedited Consideration, so that comments might

[4] Id. p. 5.

be prepared within the time set forth by the Commission in its Notice of Inquiry.

8. On April 22–23, comments from WAPA, WKAQ and WKBM were received. WAPA noted that while WRIK had "placed its own financial reports in issue by the position it adopted in its petition," that WAPA had not done so. Simply because WRIK had elected to raise a financial issue, "by that action, it cannot force disclosure of financial data from other licensees." WAPA also stated that WRIK had not made the "persuasive showing" required before allowance of financial disclosure.

WKAQ interpreted the language of Paragraph 21 of the Notice as meaning "no more than that the Commission would have available to it the financial reports of the stations participating in Docket No. 19974 and that, to the extent, *if any*, it should find it necessary to refer in its *decision* to data relied upon for the result reached, the Commission could presume that consent to such use was given by all participants. No mention whatever was made of any permission or necessity for access by any of the stations competing in San Juan to the confidential reports of any of the other stations." It suggested that WRIK has provided no facts in support of its contention that access be given to annual reports of the other licensees.

WKBM adopted paragraph 8 of WAPA's Petition for Partial Reconsideration, which stated that financial information will not ordinarily be released by the Commission unless the financial status of the party whose information is sought is placed into controversy by that party.

9. We generally allow inspection of Annual Financial Reports when the party against whom disclosure is sought puts his economic status at issue by relying on confidential information therein contained.[5] That such information is available to the party making the argument but not to those resisting it seems manifestly unfair. We thus allow disclosure of Forms 324 when petitioner meets three tests: 1) demonstrates sufficient relevance and materiality; 2) shows a reasonable necessity, and 3) justifiably claims that the data sought may not otherwise be obtained.[6]

10. WAPA has met all three tests. 1) The data is relevant since the crux of WRIK's claim is that unless allowed to move its transmitter an already precarious financial posture will be even further jeopardized. 2) Sufficient necessity is present as, without the information in question WAPA cannot contest WRIK's assertions. 3) Since WRIK at least implicitly refuses to disclose without counter-disclosure by the three San Juan stations, the data sought by WAPA may not otherwise be obtained.

11. Concerning WRIK's counter-request for inspection of the Forms 324 of the San Juan stations, neither WAPA, WKAW or WKBM has yet raised a financial issue. I find the San Juan stations' arguments compelling that WRIK has failed to make a strong showing of neces-

[5] See Multivision Northwest, Inc., 8 F.C.C. 2d 892, *aff'd.*, 10 F.C.C. 2d 391 (1967); Cape Cod Broadcasting Co., 23 F.C.C. 2d 277 (1970); Capital Cities Communications, Inc., —— F.C.C. 2d (1973).

[6] See Camden Branch of NAACP and Others, —— F.C.C. 2d —— (1973); Alianza Federal de Pueblos Libres, 31 F.C.C. 2d 557, 558–9 (1971); KOWL, 10 F.C.C. 2d 132, 134 (1967); Multivision Northwest, Inc., *supra*; Capital Cities Communications, Inc., *supra*.

sity in its inspection request. I also have doubts, despite WRIK's lengthy discussion, as to the relevancy of the financial status of the San Juan stations (not raised by them) in what is essentially a controversy concerning relocation of WRIK's transmitter.

12. I also agree with WKAQ's assertion that the language of Paragraph 21 of the Commission's Notice of Inquiry does not necessarily indicate that the financial status of all parties will be at issue in the ultimate proceeding. Indeed, the Paragraph expressly states that "we do not here attempt to spell out the showings which will be required in this matter." And further along, the language is that the information "will be made public to the *extent necessary to support the decision reached.*" (emphasis supplied) I disagree with the contention that by such language the Commission has affirmatively indicated that the financial records of all parties are necessarily relevant to the outcome. At this time at least, I believe that they are not.

13. I am therefore granting WAPA's request for inspection of the WRIK–TV Annual Financial Reports requested. And since WRIK has failed to make a persuasive showing, its request for inspection of Annual Financial Reports of WAPA–TV, WKAQ–TV and WKBM–TV is denied. Arrangements to inspect the WRIK–TV materials should be made through my office subject to the licensee's right to seek review of my action pursuant to the procedures specified in § 0.461(d)(2) of the Rules, 47 CFR § 0.461(d)(2).

JOHN M. TORBET, *Executive Director.*

FCC 74-504

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING THE MAILING OF THE REVISED PUBLIC AND BROADCAST PROCEDURAL MANUAL AND STAY OF EFFECTIVE DATE OF SECTION 1.526(a)(6)

MAY 16, 1974.

NOTICE TO ALL BROADCAST LICENSEES

In our Memorandum Opinion and Order in Docket 19153 (38 FR 3541) the effective date of Section 1.526(a)(6) of our rules requiring licensees to retain a copy of the Public and Broadcasting Procedural Manual in their local public file was stayed until a revised version of the Manual was mailed to all licensees.

In view of the anticipated early resolution of certain issues in Docket 19260 (in the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act) and the probability that such action will necessitate some additional revisions being made to the Manual, we have decided to briefly delay the issuance of a revised Procedural Manual.

Until the Manual has been mailed to all licensees, the effective date of Section 1.526(a)(6) will continue to be stayed. Moreover, the texts of the new renewal announcements (pre-filing and post-filing), contained in revised Section 1.580 and scheduled to first be broadcast on June 1, 1974 by stations with licenses which expire on December 1, 1974, are hereby temporarily amended, with the final two paragraphs being combined to read as follows:

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the Commission by (date first day of last full calendar month prior to the month of expiration) by writing the FCC, Washington, D.C. 20554.

Upon the completion of the mailing of a revised Procedural Manual, Section 1.526(a)(6) will take effect, and the texts of the new renewal announcements will be those which are contained in revised Section 1.580 and were included in the December 17, 1973 Public Notice on Renewal Procedures (FCC 73-1318) sent to all licensees.

Action by the Commission May 14, 1974. Commissioners Wiley (Chairman), Lee, Reid and Hooks with Commissioner Quello not participating.

FCC 74-615

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RANTOUL CATV CO., UNINCORPORATED AREA SURROUNDING RANTOUL, ILL. For Certificate of Compliance	CAC-2736 IL201

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION:

1. On August 8, 1973, Rantoul CATV Co. filed an application for a certificate of compliance in which it proposes to operate a new cable system in the unincorporated area surrounding Rantoul, Illinois, which is located in the Springfield-Decatur-Champaign-Jacksonville, Illinois television market (#64).[1] The applicant proposes to carry the following television broadcast signals:

WCIA (CBS, Channel 3), Champaign, Illinois
WICD (NBC, Channel 15), Champaign, Illinois
WAND (ABC, Channel 17), Decatur, Illinois
WILL-TV (Educ., Channel 12), Urbana, Illinois
WGN-TV (Ind., Channel 9), Chicago, Illinois
WFLD-TV (Ind., Channel 32), Chicago, Illinois

The proposed signal carriage is consistent with the cable television rules, and the application is unopposed.

2. Rantoul CATV Co. seeks waiver of the franchise-holding requirement of Section 76.31 of the Rules because it contends that Champaign County lacks proper authority to issue a franchise. In support of its contention, Rantoul CATV furnishes a letter it received from Mr. James R. Burgess, Jr., State's Attorney for Champaign County, and legal counsel to the County Board. The letter states in pertinent part:

> . . . [P]lease be advised that, in my opinion, the County of Champaign lacks authority to regulate cable television within the area immediately surrounding Rantoul. Regulate in this context I construe as synonymous with franchise . . .[2]

Also, it was noted within the letter that the Chairman of the Board was aware of the correspondence. Accordingly, Rantoul CATV requests special relief, pursuant to Section 76.7 of the Commission's Rules, to qualify under Para. 116, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), which provides for case-by-case consideration where it is claimed that there is no franchise or

[1] The area to be served is the unincorporated area within one and one-half miles from the boundaries of the Village of Rantoul, all of which is located within Champaign County. The approximate population of the area to be served is 1,250. The system will provide all required access cablecasting services, pursuant to Section 76.251 of the Rules, and will have a 20-channel capacity.

[2] *Accord, Community Cablevision, Inc.*, FCC 74-201, 45 FCC 2d 678 (1974).

other appropriate authorization available for the cable operator to submit in an application for a certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal assuring that the substance of our rules, and specifically Section 76.31, has been satisfied.

3. In support of its request, Rantoul CATV has made the following representations to the Commission:

(a) That it will commence actual construction of its system within 180 days of the issuance of a certificate of compliance and shall complete construction of the system no later than eighteen months from the date construction is first commenced.

(b) That it shall make only such charges as are authorized for its cable television system serving the Village of Rantoul and that increases in rates will be made only after an arbitration procedure as is specified in the Rantoul franchise.[3]

(c) That it shall maintain a local business office for the purpose of handling subscriber complaints and that it shall adhere to a specified set of procedures for the handling of such complaints.

(d) That it shall comply with Section 76.31(a)(6) of the Rules and make such modifications in its operations as are required by future Commission amendments to the Rules.

Furthermore, Rantoul CATV requests that the certificate of compliance be issued only until March 31, 1977, which is the expiration date of the certificate of compliance for the Village of Rantoul.

4. We believe Rantoul CATV has submitted an acceptable alternative proposal which assures compliance with the substance of Section 76.31 of the Rules. Therefore, a certificate of compliance will be issued until March 31, 1977. This grant is made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–2736) filed by Rantoul CATV Company IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] The franchise for the Village of Rantoul sets rates at $15 per installation with a $5 per month subscriber fee. Rantoul CATV's application for a certificate of compliance for the Village of Rantoul was granted on February 13, 1974, by Acting Chief, Cable Television Bureau, pursuant to delegated authority.

FCC 74-530

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RCA GLOBAL COMMUNICATIONS, INC. Application for Authorization, Pursuant to Section 214 of the Communications Act of 1934, To Lease and Operate Satellite Voice Circuits Between the Continental United States and Hawaii	Files Nos. T-C-2033, T-C-2033-A, T-C-2033-1, T-C-2033-2, T-C-2033-3, T-C-2033-4

ORDER

(Adopted May 22, 1974; Released May 24, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

In *Hawaiian Telephone Co.* v. *FCC*, 73-1018, decided May 3, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's decision in the above-captioned case, 72M-754, affirmed, 37 FCC 2d 1043 (1972). The Court held that the approval of the application of RCA Global Communications failed to conform to Section 214 of the Communications Act and Section 63.01 of the Commission's Rules and Regulations. The Court has directed the Commission to reconsider its decision and to file its subsequent opinion by September 2, 1974.

Accordingly, IT IS ORDERED that the parties submit within 30 days of the release of this Order, with reply comments to be filed within 15 days thereafter:

(1) Factual data to demonstrate the presence or absence of public need and public benefits associated with RCA Global's proposed service, and

(2) Comments on the relevancy and significance of this data.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-632

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART O—STATEMENT OF ORGANIZATION, DELEGATIONS OF AUTHORITY AND OTHER INFORMATION REORGANIZATION OF OFFICE OF CHIEF ENGINEER

ORDER

(Adopted June 17, 1974; Released June 20, 1974)

BY THE COMMISSION:

At a session of the Federal Communications Commission held at its offices in Washington, D.C.;

The Commission having under consideration the re-organization of the Office of Chief Engineer;

IT APPEARING, that the amendments adopted herein would promote greater efficiency and effectiveness in Commission operations; and

IT FURTHER APPEARING, that the amendments adopted herein relate to Commission organization and, therefore, compliance with the public notice and rule-making procedures of the Administrative Procedure Act (5 USC § 3553) is not required:

IT IS ORDERED, that, effective August 1, 1974, and pursuant to Sections 4 (f) and (i) and 5(b) of the Communications Act of 1934, as amended, the Office of Chief Engineer is re-organized;

IT IS FURTHER ORDERED, that pursuant to Sections 4 (f) and (i) and 5(b) of the Communications Act of 1934, as amended, Part O of the Commission's Rules and Regulations is amended, effective August 1, 1974, as set out in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part O of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 0.32 is amended as follows:

§ 0.32 Units in the Office.

The Office of Chief Engineer is comprised of the following units:

(a) Immediate Office of the Chief Engineer.
(b) International and Operations Division.
(c) Research and Technical Division.
(d) Laboratory Division.
(e) Spectrum Management Task Force.

2. Section 0.33 is amended as follows:

§ 0.33 Immediate Office of Chief Engineer.

The Immediate Office of the Chief Engineer assists the Chief Engineer in planning, directing, coordinating, and executing his functions. The Immediate Office of the Chief Engineer is composed of the Chief Engineer, the Deputy Chief Engineer, a Planning and Coordinating Staff, a Spectrum Allocations Staff and an Administrative Section.

(a) Plans and Coordination Staff.

This staff is responsible for developing medium and long range programs for the Office of Chief Engineer (OCE) and evaluating program accomplishments and advises the Chief Engineer of their effectiveness. In carrying out these responsibilities, the staff:

Develops and coordinates overall policies, programs, objectives, and priorities for all programs and activities in consultation with the Divisions and activities of the Office of Chief Engineer; insures that programs are consistent with Commission policies; reviews program performance, accomplishments and effectiveness; recommends changes in policies, programs, objectives and priorities.

Analyzes short and long term technical developments and the impact that predicted growth of existing and new technology will have on the Chief Engineer's mission and workload; develops plans to integrate new and revised requirements for the Divisions and activities into current and future programs.

Develops and evaluates (through such techniques as cost benefit-analysis) alternative engineering techniques; considers potential tradeoffs between various technologies applicable to accomplishing the Chief Engineer's mission; recommends changes in present engineering techniques and organizations which will maximize mission accomplishment under alternative resource allocations.

Recommends legislation and rule changes; reviews legislation and rule-making proposals initiated by other offices which will have a potential impact on the Office of Chief Engineer programs and operations; determines impact in terms of engineering techniques and organization, workload and resource requirements.

Provides the Chief Engineer with planning projections of future requirements for personnel, technical equipment and real property requirements to support programs.

Maintains liaison with other agencies and communications users on matters concerning program development and evaluation.

Develops and applies techniques for measuring program performance and provides the Chief Engineer with program progress and evaluation reports.

Assists the Divisions in formulating budget estimates and justifications for approved programs.

(b) *Spectrum Allocations Staff*

This staff is responsible for the conduct of surveys, studies, and proceedings aimed at achieving optimum use of the Spectrum. In carrying out its responsibilities, the staff:

Conducts engineering surveys of the usage being made of frequency bands allocated to the various U.S. radio services throughout the usable spectrum and makes engineering studies directed toward obtaining the most efficient use of the radio spectrum from existing services and to provide for the frequency requirements of new users of radio.

Administers those portions of Part 2 of the Commission's Rules dealing with the assignment and use of frequencies and the U.S. Table of Frequency Allocations, including development and initiation of rule making proceedings pertaining to changes in the Table of Frequency Allocations.

Conducts engineering studies, directed toward obtaining the greatest number of usable channels within a given frequency band through the use of the least channel width practical.

Conducts studies and initiates rule making to optimize use of the radio spectrum.

Anticipates and develops solutions for future allocations problems.

Accomplishes coordination of frequency allocation problems with the public, with other offices of the Commission and with other government agencies.

3. Section 0.34 and headnote are amended to read as follows:

§ 0.34 Research and Technical Division

The Research and Technical Division reviews and analyzes technical and scientific data relating to terrestial and space communications; conducts scientific

studies in wave propagation, satellite and space communications; studies technical aspects of potential new uses of radio; conducts special projects to obtain theoretical and experimental data on new or improved techniques; develops practical applications for various radio services in consultation with the Bureaus concerned; conducts technical studies of equipment design and performance; and provides Commission representation at national and international conferences.

4. Section 0.35 and headnote are amended to read as follows:

§ 0.35 Laboratory Division

The Laboratory Division studies new phenomena, proposed new systems, and new equipment looking toward the greater use of radio, the reduction of interference, and the establishment of appropriate rules and regulations; participation in various intergovernmental, national, and international organizations looking toward the standardization of equipment and measuring units and methods as well as the more efficient use of the radio spectrum or the reduction of interference; designs and assembles apparatus for special tests and studies, and performs special tests and studies concerning propagation, equipment or systems, and evaluates the results of such tests or studies with regard to the Commission's problems, often looking toward new or modified rules; acts on application for type approval and makes type approval tests on equipment including those equipments under Parts 15, 18, 73, 81, 83, and 95 of this chapter requiring type approval; acts on applications for type acceptance of equipment and issues lists of type accepted and type approved equipment; acts on applications for advance approval of subscription television technical systems and issues lists of approved subscription television technical systems; conducts technical studies of equipment design and performance; provides information and comments on test procedures and test results to assist in the evaluation of material supporting certifications; conducts special tests of equipments in connection with the certification and type acceptance programs; designs, develops and constructs equipment for use in connection with other Commission activities; standardizes and calibrates equipment and installations for other Commission activities and makes tests of radio devices for other Government departments and agencies.

5. Section 0.36 and headnote are amended to read as follows:

§ 0.36 International and Operations Division

The International and Operations Division administers Part 5 of this chapter regulating the Experimental Radio Services; performs engineering and management functions with respect to equipment certifications and the formulation of rules, technical standards and general policy for Parts 15 and 18 of this chapter; reviews patents as they are issued by the Patent Office to determine which patents may dominate radio services regulated by the Commission and notifies the General Counsel as to such findings; provides Commission representation on, and coordination with, the Interdepartment Radio Advisory Committee (IRAC) and, as may be required, on other national and international telecommunication bodies; coordinates frequency allocation policy matters involving government users of radio with the Office of Telecommunications Policy; maintains the Commission's master frequency record of assignments made; notifies United States frequency assignments to the International Frequency Registration Board of the International Telecommunication Union; performs staff functions relating to international communications conferences and agreements having to do with frequency allocation and assignment; and communicates as necessary with administrations in foreign countries, through appropriate channels, concerning matters which relate to assignment of radio frequencies and to control of radio interference.

§ 0.37 [Deleted]

6. Section 0.37 is deleted in its entirety.

7. Section 0.38 remains unchanged.

FCC 74-582

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
ROGERS RADIO COMMUNICATIONS SERVICES, INC., ET AL.
Concerning Approval of Three Inter-Carrier Operating Agreements Between Licensees in Domestic Public Land Mobile Radio Service

JUNE 5, 1974.

This concerns the three inter-carrier operating agreements between Rogers Radio Communications Services, Inc. (Rogers), and (1) Chicago Communications Service, (2) Radio Communications Corporation, and (3) Northern Illinois Radiophone and Paging Systems, Inc., all licensees in the Domestic Public Land Mobile Radio Service. These agreements were submitted to the Commission on December 6, 1973, and are the same except for the parties.

Basically, the agreements are the same as one already approved by the Commission, *Sherman M. Wolf d/b/as Zipcall and Colgan Communications, Inc.*, 42 FCC 2d 1125 (1973). Rogers is the licensee of Station KTS204, providing one-way paging service on the frequency 152.24 MHz, in the Chicago area. Under the terms of the agreements, each of the other three parties would be permitted to issue paging units to its subscribers to operate through Rogers' existing or future facilities under the call sign KTS204. The service provided by Rogers will consist of automatic direct dial access tone-only paging service which will not require any dispatching or control point facilities to be established by the other parties. Unlike the agreement mentioned above, the ones here under consideration do not involve the dismissal of competing applications. However, the result of the agreement will be an expansion of service offerings by the carriers, and the public will receive paging over a wider area than it can at present without anti-competitive conduct by the licensees. Thus, it appears that approval of the agreements, with the conditions listed below, will serve the public interest.

In our letter of September 19, 1973, approving the agreement between Zipcall and Colgan Communications, we concluded, at page 1126:

> approval of the agreement will serve the public interest, provided that all subscribers are charged the same rates as if they subscribed directly to Zipcall, and provided further that subscribers are informed of the source of that service. Furthermore, the parties should understand that our approval of their agreement does not constitute in any way an approval of any lessening of their competitive activities, and that we will reexamine the matter if such a lessening of normal competitive activities should appear to be the result of their agreement.

These provisions are to be understood as equally applicable to our approval of the present agreement.

A copy of this letter will be associated with the files of Station KTS 204 for future reference.

Commissioner Quello not participating.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-526

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING LICENSEE RESPONSIBILITY UNDER AMENDMENTS TO THE COMMUNICATIONS ACT MADE BY THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

JUNE 5, 1974.

LICENSEE RESPONSIBILITY UNDER AMENDMENTS TO THE COMMUNICATIONS ACT MADE BY THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

The Commission has received a number of inquiries and complaints concerning the obligations of licensees under Section 312(a)(7) and 315 of the Communications Act with respect to a political candidate's right to use broadcast facilities, with particular reference to time limitations which a licensee may impose on that right. It is the purpose of this Public Notice to give some guidance in this area and to advise all interested persons of the Commission's view that a licensee may not deny access by candidates for Federal office to prime time [1] or arbitrarily deny candidates the right to purchase spot announcements of certain lengths.

On February 7, 1972, Congress enacted the Federal Election Campaign Act of 1971 (Public Law 92-225), effective April 7, 1972. This law, among other things, amended Sections 312 and 315 of the Communications Act to require access to broadcast facilities by candidates for Federal elective office and to establish certain limitations on the rates to be charged all legally qualified candidates for public office. As amended, Section 312 provides in pertinent part:

> (a) The Commission may revoke any station license or construction permit—
>
> > (7) For willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a candidate for Federal elective office on behalf of his candidacy.

As we stated in our Public Notice of March 16, 1972 entitled *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 37 Fed. Reg. 5796, the provisions of Section 312(a)(7) impose upon licensees, in addition to the overall obligation to operate in the public interest, the specific responsibility to afford either reasonable free access or the opportunity to purchase reasonable amounts of time to legally qualified candidates for Federal elective office. We further stated that the test of whether a licensee has fulfilled its obligations

[1] "Prime time" is used with reference to television. However, the same principle applies to periods of greatest audience potential in AM and FM, for example, "drive time."

under Section 312(a)(7) is one of reasonableness. 37 Fed. Reg. at 5804–5.

In applying this test of reasonableness in particular cases, the Commission looks to the underlying policy of the legislation as revealed by its legislative history. This history is not extensive. However, Senator Pastore, one of the sponsors of the bill ultimately enacted, explained the purpose of the legislation as follows:

> It attempts to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters. (117 Cong. Rec. S12872 (daily ed. Aug. 2, 1971)).

This statement of purpose was also incorporated verbatim in the Report of the Senate Commerce Committee on the proposed Act. See S. Rep. No. 96, 92d Cong., 1st Sess., p. 20 (1971). In reviewing the reasonableness of a licensee's efforts to comply with Section 312(a)(7), the Commission must therefore be mindful of Congress' intent to ensure candidates for Federal elective office adequate opportunity to present and discuss their candidacies and hence provide the voters with information necessary for the responsible exercise of their franchise.

While the statute does not establish a precise or definite standard, and we have already stated that licensee discretion is not foreclosed,[2] we believe that it is unreasonable and not in compliance with the statute for a licensee to adopt a rigid policy of refusing to sell or give prime-time programming to legally qualified candidates for Federal elective office.

Such a refusal would deny the candidates access to the time periods with the greatest audience potential, and would be inconsistent with the Congressional intent to give ". . . candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." We shall therefore interpret and apply Section 312(a)(7) in accord with this view. It should be noted that the principle of access to prime time by Federal candidates includes the opportunity to purchase or otherwise receive program time in the absence of countervailing circumstances such as a multiplicity of candidates. See *Summa Corporation* (KLAS–TV) 43 FCC 2d 602 (1973). If such circumstances are present, then spot announcements in lieu of program time may be appropriate.

It has also been claimed that candidates sometimes cannot purchase the same length spots as other advertisers. Section 315, as amended, provides:

> (b) The charges made for the use of any broadcast station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

[2] We stated in the March 1972 Public Notice: "Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts." 37 Fed. Reg. at 5804 (Section VIII, Q. and A. 3).

> (1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period . . .

This provision of course applies to all legally qualified candidates for public office, and not merely Federal candidates. Complaints have been received from candidates that some licensees who sell spot announcements to candidates do not permit the candidates to purchase the various lengths and/or types of spot announcements which are available to commercial advertisers. Such a disparity in treatment is not in accord with the purpose of the statute. The Report of the Senate Commerce Committee on the bill ultimately enacted as the Federal Election Campaign Act of 1971 states:

> Use of the lowest unit charge as the rate which broadcasters may charge legally qualified candidates for public office for the use of broadcast time does no more than place the candidate on par with a broadcast station's most favored commercial advertiser. (See S. Rep. No. 96, Cong., 1st Sess., p. 27 (1971). See also 37 Fed. Reg. at 5800).

Thus, where licensees sell spot announcements to legally qualified candidates for public office, it would be contrary to the Congressional objective of putting candidates in the same position as the most favored commercial advertisers to deny to such candidates the opportunity to purchase spot announcements of the type and length which are available to commercial advertisers.

Action by the Commission May 22, 1974. Commissioners Lee and Hooks, with Commissoners Wiley (Chairman) and Reid concurring, and Commissioner Quello abstaining from voting.

FCC 74-443

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
SOUTHERN CALIFORNIA BROADCASTERS ASSOCIATION
Concerning Clarification of Primer on Ascertainment of Community Problems by Broadcast Applicants

APRIL 18, 1974.

This is in reference to your letter of February 28, 1974, requesting clarification of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

The question presented is whether, in view of the current energy crisis, the *Primer* permits telephone interviews with community leaders outside the city of license and, if so, what percentage of those interviews may be conducted by telephone.

The *Primer* provides, among other things, that an applicant must consult with leaders outside the city of license who can be expected to have a broad overview of community problems. The *Primer*, however, is silent on the question whether telephone interviews with community leaders may be conducted. As such, telephone interviews are not *per se* unacceptable if the applicant makes a *prima facie* showing that it has consulted with a representative cross-section of community leaders. See, *e.g.*, *Lexington County Broadcasters, Inc.*, 40 FCC 2d 694, 698 (Rev. Bd. 1973); *California Stereo, Inc.*, 39 FCC 2d 401 (Rev. Bd. 1973).

We are reluctant at this time to establish a rule of thumb as to the permissible percentage of ascertainment interviews which may be conducted by telephone for, as you know, there is a presently pending proceeding which is considering this very question. *Notice of Inquiry*, Docket No. 19715, 40 FCC 2d 379 (1973). If telephone interviews are conducted, however, we emphasize the importance of formalizing the interview by contemporaneous notes or subsequent follow-up letters. We also want to emphasize that the applicant may be called upon to show that the telephone interview resulted in a meaningful dialogue.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-043—74——6

FCC 74-622

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TELEPROMPTER OF FLORIDA, INC., ORANGE CITY, FLA.	CAC-1936 FL136
TELEPROMPTER OF FLORIDA, INC., LAKE HELEN, FLA.	CAC-1937 FL122
TELEPROMPTER OF FLORIDA, INC., DELTONA, FLA.	CAC-1938 FL264
TELEPROMPTER OF FLORIDA, INC., DEBARRY, FLA.	CAC-1939 FL265
TELEPROMPTER OF FLORIDA, INC., ADJACENT PORTIONS OF VOLUSIA COUNTY, FLA.	CAC-1940 FL043
For certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND HOOKS CONCURRING IN THE RESULT.

1. On February 9, 1973, TelePrompTer of Florida filed applications for certificates of compliance (CAC-1936-1940) to commence cable television service at the above-captioned communities,[1] all of which are located within the Orlando-Daytona Beach, Florida, major television market (#55). TelePrompTer seeks certification for the carriage of the following signals:

WESH-TV (NBC, Channel 2), Daytona Beach, Florida
WEDU (Educ., Channel 3), Tampa, Florida
WDBO-TV (CBS, Channel 6), Orlando, Florida
WJCT (Educ., Channel 7), Jacksonville, Florida
WFTV (ABC, Channel 9), Orlando, Florida
WTCG (Ind., Channel 17), Atlanta, Georgia
WLTV (For. Lang., Channel 23), Miami, Florida
WMFE-TV (Educ., Channel 24), Orlando, Florida
WSWB-TV (C. P., Channel 35), Orlando, Florida
WTOG (Ind., Channel 44), St. Petersburg, Florida

The carriage of these signals is consistent with the Commission's Rules and the applications are unopposed.

2. TelePrompTer of Florida requests a waiver of the provisions of Section 76.251 of the Rules to allow it to provide a common set of access channels for the five communities which will be served from a

[1] The populations of the communities and dates of the franchise grants are as follows: Orange City—1,777, April 14, 1970; Lake Helen—1,303, August 6, 1970; Deltona—4,868, September 4, 1969; DeBarry—3,154, September 4, 1969; Adjacent portions of Volusia County—14,000, September 4, 1969. TelePrompTer states that it will provide at least 24 channel capacity in each community.

single headend.[2] In support of its waiver request TelePrompTer of Florida states that the communities are neighboring, the population of each community is small and all of the communities share a political, social and economic community of interest.

3. We acknowledged in Paragraph 147 of the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that considering the small size of four of the five communities involved, a partial waiver of Section 76.251 to allow TelePrompTer of Florida to share one set of access channels among the five systems is justified and within the scope of Commission precedent. *Century Cable Communications, Inc.*, 44 FCC 2d 1023 (1974). However, should sufficient demand develop, we expect TelePrompTer of Florida to make additional channels available. Moreover, this waiver will extend only to March 31, 1977. When TelePrompTer of Florida applies for recertification, we will expect it to show the degree to which its proposal has been successful and has operated in the public interest.

4. None of the franchises granted to TelePrompTer of Florida contains recitations that the applicant's qualifications were considered in a public proceeding affording due process or that significant construction will be accomplished within a prescribed period of time or that the applicant will maintain a local complaint office. All the franchises contain a 6% franchise fee, and although the franchises for Orange City and Lake Helen were awarded for 15 years, the other three franchises were awarded for indefinite periods. Finally, although subscriber rates are specified in the Orange City and Lake Helen franchises and may not be changed without City Council approval, the rates for the remaining three systems are not specified. We note however that TelePrompTer of Florida has furnished a copy of its proposed rates to the appropriate franchising authorities and has pledged no increase in rates without those bodies' prior approval. Only substantial consistency with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, according to the note following Section 76.13(a)(4) of the Rules. *CATV of Rockford, Inc.*, 38 FCC 2d 10 (1972), *recons. denied*, 40 FCC 2d 493 (1973). We find that these franchises are substantially consistent with Section 76.31 of the Rules, in a manner sufficient to justify a grant of certificates of compliance until March 31, 1977. *See, e.g., Century Cable Communications, Inc., supra.*

In view of the foregoing, the Commission finds that a partial waiver of the provisions of Section 76.251 of the Rules and a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance (CAC–1936–1940), filed by TelePrompTer of Florida, ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] TelePrompTer will serve the above-captioned communities from a headend located at Deland, certification for which was granted on April 13, 1973. This system provides its subscribers with the same signals for which TelePrompTer seeks certification in this application, and additionally provides its subscribers four access channels which are separate from those to be provided pursuant to this application.

FCC 74-543

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to the
TRIBUNE CO.
Concerning a Determination Under Section 310(a)(5)

MAY 29, 1974.

This is in reply to your letter of April 24, 1974, in which, on behalf of the Tribune Company, you request that the Commission determine that Mr. Robert M. Schmon, a citizen of Canada, may serve as one of the Company's corporate officers.

As is stated in your letter, your request stems from the provisions of Section 310(a)(5) of the Communications Act of 1934, as amended, which provides that broadcast licensees shall not be granted to or held by:

> Any corporation directly or indirectly controlled by any other corporation of which any officer . . . [is an alien], ... if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

While a literal reading of this language seems to indicate that the Commission's finding is a condition subsequent to the election of an alien officer, this approach would compel a corporation which controls one of our corporate licensees and elects an alien as a corporate officer to incur the risk of having its subsidiary lose its license by revocation or denial or renewal. As we have stated in response to two previous similar requests, one in May 1970 (23 FCC 2d 659) and the other in November 1972, "We believe a better approach—and one that would recognize the changing composition of our modern corporate structures—would be to make a public interest determination on the basis of undisputed facts presented by the licensee, which determination would have continuous validity in the absence of new or changed circumstances of substantial materiality."

Petitioner, the Tribune Company, states that Mr. Schmon is now the President of Ontario Paper Company and of certain of its subsidiaries; that he has been a director of the Tribune Company since 1969; and that he was born at Glen Ridge, New Jersey and graduated from Princeton University in 1946. Petitioner further states that Mr. Schmon served in the Royal Canadian Air Force in World War II, and became a Canadian citizen in 1964. Petitioner indicates that because of his increasing responsibilities in connection with the operations of the parent company, the Board of Directors has elected Mr. Schmon to be a Vice President of Tribune Company, provided the Commission states that it has no legal objection under Section 310 (a) (b) of the Communications Act to his serving as a corporate officer.

On the facts set forth herein, the Commission does not find that because of Mr. Schmon's position as a Vice President of the Tribune Company refusal or revocation of licenses held by subsidiaries of the Tribune Company would be in the public interest. Therefore the Commission would have no legal objection under 310(a)(5) of the Communications Act to the election of Mr. Robert M. Schmon, a Canadian citizen, as a corporate officer of the Tribune Company.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-617

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VALLEY CABLEVISION CORP., MISHAWAKA, IND. For Certificate of Compliance	CSR-496 INO62

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION:

1. Valley Cablevision Corporation has filed the above-captioned application for certification and request for special relief to add the signals of Stations WBBM-TV (CBS, Channel 2), WMAQ-TV (NBC, Channel 5), and WLS-TV (ABC, Channel 7), Chicago, Illinois, and WKZO-TV (CBS, Channel 3), Kalamazoo, Michigan, to its existing cable television operations at Mishawaka, Indiana.[1] Valley currently provides subscribers with signals of the following television broadcast stations:

WNDU-TV (NBC, Channel 16), South Bend, Indiana
WSBT-TV (CBS, Channel 22), South Bend, Indiana
WSJV (ABC, Channel 28), South Bend, Indiana
WTTW (Educ., Channel 11), Chicago, Illinois
WGN-TV (Ind., Channel 9), Chicago, Illinois
WSNS-TV (Ind., Channel 44), Chicago, Illinois
WFLD-TV (Ind., Channel 32), Chicago, Illinois
WCIU-TV (Ind., Channel 26), Chicago, Illinois
WNIT (Educ., Channel 34), South Bend, Indiana

Valley's application is unopposed.

2. Valley concedes that its request is inconsistent with Section 76.63 (a) of the Commission's Rules, but seeks a waiver of that section as it applies to this community. To support this request, Valley points out that its cable television system at South Bend is authorized to carry the requested distant network signals.[2] Valley asserts that the resulting disparity in signal carriage requirements between two communities in the same county "reflect[s] both the accident of geography and the timing of franchising activity in the county" and that this disparity discriminates against residents of Mishawaka, who "[have] intertwined social, political and economic interests with the surrounding communities where additional signals from the Chicago and Kalamazoo television markets are available." Valley argues, further, that

[1] Mishawaka, located in the 80th-ranked South Bend-Elkhart, Indiana, television market has a population of 35,517 (1970 census).

[2] The South Bend system commenced operations in December, 1968. The Chicago and Kalamazoo network signals are, accordingly, "grandfathered" on that system pursuant to Section 76.65 of the Rules.

"since the addition of network affiliates from Chicago and Kalamazoo would not import duplicative programming into the South Bend market" and "since the requested array of signals is already widely available in the substantial portion of the . . . market" a grant of its request would not impose an adverse economic impact on the operations of local television broadcast stations.

3. Valley's arguments are similar to those raised and rejected in *Communicable of Texas, Inc.*, FCC 74–445, —— FCC 2d —— (1974). As in that case, we conclude that the applicant has not met the "substantial burden" necessary to justify a waiver of our signal carriage rules [3] and that it has submitted no evidence to warrant treatment more favorable than that afforded other cable systems in similar markets. In Paragraph 107 of the *Cable Television Report and Order*, *supra*, at 185, we noted that our adoption of the "grandfathering" provisions of Section 76.65 was motivated by our recognition of the "difficulty of withdrawing signals to which the public has become accustomed," and by our "deference to the equities of existing system operations." This difficulty and these equities do not exist in the case of cable television systems that commenced operations after the adoption of our current signal carriage rules. As we noted in Paragraph 112 of the *Report and Order*, *supra*, these current rules "reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals." In view of the foregoing, we have concluded that we would not be serving the public interest by granting the above-captioned application.

Accordingly, IT IS ORDERED, That the application for certification and the petition for special relief (CSR–469) filed on December 21, 1973, by Valley Cablevision Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] Para. 112, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186–87 (1972).

FCC 74-604

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOICE OF DIXIE, INC., BIRMINGHAM, ALA.	Docket No. 18664 File No. BPH-6449
FIRST SECURITY AND EXCHANGE CO., BIRMINGHAM, ALA.	Docket No. 18666 File No. BPH-6610
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 19, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. In a Decision, 45 FCC 2d 1027, released March 15, 1974, we granted the application of Voice of Dixie, Inc. (Voice) for a new FM station at Birmingham, Alabama, and denied the competing application for the same facility filed by First Security and Exchange Company (First Security). In that Decision we disqualified First Security for its failure to comply with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). See *Suburban Broadcasters*, 30 FCC 1021 (1961), affirmed *sum nom. Henry* v. *Federal Communications Commission*, 302 F2d 191 (1962). Under consideration here are a petition for rehearing and reconsideration filed April 15, 1974, and a correction filed April 16, 1974, by First Security; oppositions thereto filed May 9, 1974, by Voice and by the Chief, Broadcast Bureau; and a reply, filed May 21, 1974, by First Security.

2. In its petition, First Security argues that our Decision is "unduly harsh," is contrary to Commission precedent, and employs a new interpretation of the *Primer*. It asserts that Voice's survey of community needs, if judged by the same standard, would also be defective; and that allegations made in a petition to deny Voice's pending application for renewal of its license for standard broadcast station WVOK, filed by the Birmingham Chapter, Human Relations Council of Alabama (HRC), raised questions which require a hearing on Voice's qualifications to receive an additional broadcast authorization in Birmingham.

3. The major premise upon which our Decision was based was the rejection of the 21 interviews contained in First Security's survey which were found by the Board to have been improperly conducted. *Primer*, Question and Answer 11; *Childress Broadcasting Corp.*, 37 FCC 2d 776 (Rev. Bd. 1972). With the deletion of those interviews, no labor leaders were included in First Security's survey and under the clear mandate of Answer 16 of the *Primer*, First Security's survey

was defective. Under the circumstances of this case, the Decision is neither contrary to law nor harsh. Indeed, although this matter was in hearing when the *Primer* was adopted and First Security was given an opportunity to amend its survey to comply with the *Primer*, First Security failed to follow the unequivocal language of Answers 11 and 16. In this regard we note that, with respect to Answer 11, the *Primer* specifically rejected the proposition that interviews with community leaders could be made by nondecision making personnel; that we required such interviews to be conducted by principals or management level employees, 27 FCC 2d at 663–664; and that we changed Answer 16, which initially provided in the *Proposed Primer* that an ascertainment process omitting leaders of a significant group would "be subject to question," to read that such a survey "is defective."

4. The cases cited by First Security: *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497 (1971); *New Broadcasting Corp.*, 37 FCC 2d 662, 25 RR 2d 561 (1972); *Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 25 RR 2d 873 (1972); *The Evening News Association*, 35 FCC 2d 366, 24 RR 2d 667 (1972); *The Outlet Co.*, 38 FCC 2d 355, 25 RR 2d 1077 (1972); and *RadiOhio, Inc.*, 38 FCC 2d 721, 26 RR 2d 327 (1972), are distinguishable from the instant proceeding. In each of those cases we were able to find that the applicant substantially complied with the *Primer* because its survey included community leaders who represented all of the significant interest groups which comprised the population. A conclusion of substantial compliance, however, is not appropriate here, because of the omission of leaders representing a significant interest group. *Primer*, 27 FCC 2d at 668; *cf.*, *RadiOhio, Inc.*, *supra*, at 728.

5. First Security's reliance on our decision in *Tri-Counties Communications, Inc.*, 28 FCC 2d 709 (1971), in an attempt to show that we have approved interviews conducted by a principal's wife, is also misplaced. In *Tri-Counties* the wife was a co-owner of the applicant and thus a principal in her own right. It also misreads the *Primer* with respect to surveys of the general public when it asserts that, if Mrs. Stewart-Magee had been employed for "this purpose, it would apparently have placed her in an acceptable category." Mrs. Stewart-Magee's participation in the survey would be valid only if she were a *bona fide* professional research organization or prospective employee of the station. On the present record, employing her for the specific purpose of conducting the survey would have been inadequate. 27 FCC 2d at 665.

6. In our Decision we noted other deficiencies, which in and of themselves might not have been disqualifying, because First Security did have a valid interview with one youth leader, with leaders from suburban communities (but not either the second largest community to be served, Tuscaloosa, or the second largest community located entirely within its service area, Bessemer), and with business leaders (but not from Birmingham's two largest employers, including the iron and steel industry which is Birmingham's dominant industry). The deficiencies, however, cannot be ignored, and they serve to indicate the extent of First Security's failure to adhere to the requirements of the Primer.

7. In its petition, First Security, for the first time, raises objections to the finding of sufficiency as to Voice's ascertainment efforts made by the Administrative Law Judge in the Initial Decision, 41 FCC 2d 560, released September 17, 1971. First Security failed to take exceptions to those findings and, accordingly, waived its right to object to Voice's survey (see Section 1.277 of the Rules which provides that objections not saved by exceptions are waived). Under these circumstances, we find no reason to give considerations now to matters which First Security has deemed significant only from the "highland of hindsight." *Cf.*, *Guinan* v. *FCC*, 297 F 2d 787 (1961). Finally, we have already considered First Security's arguments respecting the HRC petition, we conditioned the grant of Voice's application on the resolution of the issues raised by that petition, and we see no reason to modify that determination.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration and rehearing, filed April 15, 1974, by First Security and Exchange Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-548

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION) Transmittal No. 6974; and Revisions of Western Union Tariffs FCC No. 229 (Money Order Service), 240 (Telex Service), 255 (Public Message Telegraph Service) and 258 (Teletypewriter Exchange (TWX) Service)	Docket No. 20069

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 6, 1974)

BY THE COMMISSION:

1. On April 1, 1974, revised tariff schedules were filed by Western Union under Transmittal No. 6974, to become effective generally on June 1, 1974 (although certain material contained therein is to become effective December 1, 1974). These revised schedules apply to the interstate Money Order, Telex, Public Message Telegraph and Teletypewriter Exchange (TWX) services provided by Western Union throughout the United States.

2. The revised tariff pages filed by Western Union are as follows:

Tariff F.C.C. No. 229 (Money Order Service)

144th revised page 1
20th revised page 9A

Tariff F.C.C. No. 240 (Telex Service)

240th revised page 1
1st revised page 6C
4th revised page 8A

Tariff F.C.C. No. 255 (Public Message Telegraph Service)

37th revised page 1
10th revised page 76
4th revised page 78
4th revised page 79
1st revised page 83.1

Tariff F.C.C. No. 258 (TWX Service)

54th revised page 1
2nd revised page 20
1st revised page 20.1
2nd revised page 35
2nd revised page 75
2nd revised page 76

3. As set forth in the Transmittal letter, the specific changes made in the revised tariff pages provide for:

(1) A flat rate increase of $.50 for each Telegram, Overnight Telegram, Day Money Order and Overnight Money Order to become effective June 1, 1974, and an additional flat rate increase of $.50 for each such message and money order to become effective December 1, 1974.

(2) An improvement in the delivery service standards whereby the Company, effective June 1, 1974, will undertake to deliver Telegrams by telephone and by tieline within 2½ hours of the time filed, instead of within 3 hours as at present, and effective December 1, 1974, within 2 hours of the time filed.

(3) An increase of $7.00 in the optional basic station equipment rates applicable to Telex and TWX subscribers using Company-provided teleprinter terminal equipment and an equivalent increase in certain supplemental teleprinter station equipment.

(4) An increase of $3.00 from the present rate of $11.50 to the proposed rate of $14.50 for the TWX Network Access Arrangement applicable to each TWX customer, whether using Company-provided or customer-provided terminal equipment.

4. Appropriate cost data and other information required by Section 61.38 of the Commission's Rules (47 C.F.R. § 61.38) were submitted by Western Union in support of the tariff revisions. Western Union states that the filing is being made principally to improve the earnings obtained from its overall operations and from its Integrated Record Message Services (*i.e.*, its Telex, TWX, and Public Message Services). According to Western Union, its overall pre-tax return on investment from all its public services was only 5.5% in 1973 while its pre-tax return on investment from its Integrated Record Message Services was only 5.3% for the same year. In 1974, without any rate change, Western Union estimates that its Return on Investment will improve only marginally to 6.5%, both overall and for its Integrated Record Message Services. Western Union contends that its is justified in taking all reasonable steps consistent with its revenue requirements and marketing considerations to improve these most deficient earnings and that the present rate revisions constitute such reasonable steps. As a result of the rate increases filed herewith Western Union estimates that its earnings will increase in 1974 to an improved but still deficient level (*i.e.*, 7.2% for the Western Union overall and 7.6% for its Integrated Record Message Service).

5. Earlier increases in the charges for Telex and TWX terminals were filed by Western Union under Transmittal No. 6834 on December 29, 1972. In its Memorandum Opinion and Order adopted February 21, 1973 (FCC 73–212), the Commission suspended the effectiveness of these rate revisions for one day until March 1, 1973, and set them for investigation and hearing in Docket No. 19696. As the investigation in Docket No. 19696 included "any cancellations, amendments or reissues" of the original tariff revisions subject to investigation, the Telex and TWX revisions under consideration herein would be automatically included in Docket No. 19696, absent our present action to the contrary. However, Docket No. 19696 is now drawing to a close—Western Union having presented its direct case and no responsive case to be presented. At a hearing conference held on April 10, 1974, in Docket No. 19696, Administrative Law Judge Forest L. McClenning and the parties discussed the fact that the present tariff revisions had been filed and that they would necessitate further hearings unless the Commission ordered otherwise. As the parties were in agreement that the new tariff revisions should be treated separately from Docket No. 19696

and as the Administrative Law Judge could not know what the Commission might do regarding the current filing, he tentatively set dates for the filing of proposed findings of fact and conclusions (July 10, 1974) and reply findings (July 31, 1974) but kept the record open "until the Commission takes some action on the additional filing that has been made." (Transcript Pages 1000–1008.)

6. We agree with Western Union and the Trial Staff of the Common Carrier Bureau that in view of the stage the Docket No. 19696 proceeding has reached it would needlessly complicate and delay the conclusion of Docket No. 19696 to treat the current tariff revisions as a part of that proceeding. Therefore, the current tariff revisions will be considered in a separate proceeding we are today instituting. Thus, the inclusion in the Docket No. 19696 investigation of "any cancellations, amendments or reissues" to the tariff revisions designated for hearing therein no longer compels the Administrative Law Judge to keep the record open for the purpose of receiving evidence on the current tariff revisions.

7. Insofar as the current tariff revisions are concerned we are of the view that on the basis of Western Union's current known overall pre-tax return on investment from all its Public Message Services (5.5% in 1973) and from its Integrated Record Message Services (5.3% in 1973), there may be justification for appropriate revenue relief. Western Union estimates that its return on investment in 1974 both overall and for its Integrated Record Message Services will improve to 6.5% without any rate changes. Western Union asserts that a return of 6.5% for the Integrated Record Message Service will still yield insufficient revenues. In any case, it is our opinion that the magnitude, scope and nature of these proposed rate increases and other tariff revisions present questions of lawfulness that must be resolved. We are unable to conclude at this time that all features of the tariff revisions are just and reasonable and free of undue discrimination within the meaning of Sections 201(b) and 202(a) of the Act. We shall therefore designate the revised tariff schedules for investigation and shall suspend the effectiveness thereof and enter an accounting order providing for possible refund. However, in view of the carrier's current earnings situation and the protection afforded customers by the accounting and refund order we are providing herein, we will suspend the said tariff schedules for a period of only one day.

8. Under the foregoing circumstances, we are also of the opinion that the lawfulness of the current tariff revisions should be assessed on the basis of and subsequent to the final determinations we will make in the Docket No. 19696 proceedings now drawing to a conclusion. This procedure will in our judgment best conduce to orderly administrative process and the ends of justice.

9. Accordingly, IT IS ORDERED, That, pursuant to the provisions of Sections 201, 202, 203, 204, 205 and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of the tariff schedules filed by The Western Union Telegraph Company, submitted with Transmittal No. 6974, including any cancellations, amendments or reissues thereof;

10. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204, the tariff schedules filed by The Western Union Telegraph Company, submitted with Transmittal No. 6974, ARE HEREBY SUSPENDED until June 2, 1974 (December 2, 1974, where applicable) and that Western Union, as to the operation of such tariff schedules, shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increases specifying by whom and in whose behalf such amounts were paid, and upon completion of the investigation and decision therein, the Commission may by further order require the refund thereof, with interest, pursuant to Section 204 of the Act, and the carrier shall file such reports on the amounts accounted for as aforesaid as the Chief, Common Carrier Bureau shall require;

11. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

(1) Whether the charges, classifications, practices, and regulations published in the aforesaid tariffs are or will be unjust and unreasonable within the meaning of Section 201(b) of the Act;

(2) Whether such charges, classifications, practices, and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice to any person, class of persons, or locality, within the meaning of Section 202(a) of the Act;

(3) If any of such charges, classifications, practices, or regulations are found to be unlawful, whether the Commission, pursuant to Section 205 of the Act, should prescribe charges, classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed.

12. IT IS FURTHER ORDERED, That pending the issuance of a final decision in the Docket No. 19696 proceeding, the investigation instituted herein shall be held in abeyance, and the Commission will issue such further orders herein as may be appropriate in the light of such final decision.

13. IT IS FURTHER ORDERED, That, The Western Union Telegraph Company is named Party Respondent.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-626

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WNJR RADIO CO., NEWARK, N.J. Interim Authority To Operate the Facilities of Station WNJR, Newark, N.J.	File No. BPI-25

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 18, 1974)

BY THE COMMISSION:

1. The Commission has for consideration its interim authority issued to WNJR Radio Company to operate station WNJR, Newark, New Jersey, pending the Commission's disposition of competing applications for regular authority to operate WNJR; the decision of the United States Court of Appeals for the District of Columbia Circuit, *Fidelity Voices, Inc., et al.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 477 F. 2d 1248, 27 RR 2d 168 (1973), remanding the matter of the interim operation to the Commission for further consideration; and correspondence received by the Commission since the Court's opinion was handed down.

2. There are now pending six applications for regular authority to operate station WNJR. Those applications are as follows: Gilbert Broadcasting Corporation, file No. BP-19047; Community Group for North Jersey Radio, Inc., filed No. BP-19079; Sound Radio, Inc., file No. BP-19080; Fidelity Voices, Inc., file No. BP-19081; W. M. E. D. Associates, Inc., file No. BP-19083; and Venture III Corporation, file No. BP-19086. Originally, there were nine applicants for the Newark facility, but the number was reduced as a result of a merger of four of the nine applicants into Fidelity Voices, Inc. Three former applicants which merged with Fidelity Voices, Inc., are the following: Andrew W. Stanfield, Harry A. O'Mealia, Everett T. Felder, Frank J. Guarini and Napoleon Powell, a co-partnership d/b as Community Action Radio Enterprises, file No. BP-19082; The Brown Broadcasting Corporation, file No. BP-19084; and Greater Newark Broadcasters, Inc., file No. BP-19085. The applications for the last three applicants named have been dismissed at the request of the applicants. *Sound Radio, Inc., et al.*, 45 FCC 2d 804, 29 RR 2d 950 (1974).

3. When the Commission authorized the interim operation of WNJR pending the disposition of the applications for regular authority to operate the station, it was anticipated that the interim operation proposed would provide a means to continue the WNJR service without interruption. As the matter developed, the interim operation has been a matter of controversy since its inception. Only three of the regular applicants have participated thus far in the interim operation. These three are: Gilbert Broadcasting Corporation, Com-

munity Group for North Jersey Radio, Inc., and Venture III Corporation.

4. At the instance of Fidelity Voices, Inc., and the three applicants which have merged with Fidelity, the Commission's authorization of interim operating authority was reviewed by the Court of Appeals. The Court expressed some concern over various procedural aspects of the interim operation and remanded the case to the Commission for further consideration.

5. Since the Court's remand, the interim operators appear to have modified certain conditions under which other applicants may participate in the current WNJR operation. Sound Radio, Inc., a nonparticipant, has indicated some willingness to further negotiate its possible participation in the interim operation. W. M. E. D. Associates, Inc., has not indicated to the Commission what its position might be. Fidelity Voices, Inc., has indicated that the interim operators' proposal is wholly unacceptable.

6. Subsequent to the Commission's approval of the interim operation by WNJR Radio Company, the Commission dismissed a joint interim proposal of the North Jersey Radio Company which was submitted by Greater Newark Broadcasters, Inc., and the Brown Broadcasting Corporation. In remanding the matter of the interim operation in Newark, the Court expressed concern over the propriety of the dismissal North Jersey Radio proposal. However, neither Greater Newark Broadcasters, Inc., nor the Brown Broadcasting Corporation has renewed its request for interim authority, but, instead, the principals of both of those applicants have become principals of Fidelity Voices, Inc. *Sound Radio, Inc., et al., supra.* Under these circumstances, the only presently viable interim proposal before the Commission is the one presently authorized. In addition, since this matter was remanded to the Commission for further consideration, there have been informal attempts by the Commission's staff to foster some accommodation between the opposing factions. However, these efforts have met with no success.

7. With the matter in this posture, the Commission, in order to effectuate the Court's mandate will continue the presently authorized interim operation in effect and will, within a period of sixty days from the release of this Memorandum Opinion and Order, entertain alternative proposals for the interim operation of WNJR. The Commission would observe, in this connection, that it would appear to serve no purpose for the opposing factions simply to reject other proposals for interim operation without advancing some concrete alternative. If, at the end of the sixty-day period, some means of continuing the interim operation of WNJR within the scope of the Court's mandate cannot be found, the Commission will designate for an appropriate hearing before the Commission's Review Board any conflicting proposals and related problems.

8. Accordingly, IT IS ORDERED, That the Commission will accept, for its consideration, alternative proposals for the operation of WNJR, Newark, New Jersey, by any eligible applicant or groups of applicants within sixty (60) days from the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*